

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

Due to the threat of COVID-19, Governor Ige issued the most recent Emergency Proclamation Related to the COVID-19 Delta Response, dated October 1, 2021 that suspends parts of Hawai'i Revised Statutes Chapter 92, Public Agency Meetings and Records to, among other things, enable boards to conduct business without any board members or members of the public physically present at the same location.

The OHA Board of Trustees will hold virtual meetings until further notice. 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

Minutes of the Office of Hawaiian Affairs
Board of Trustees
MINUTES
October 7, 2021

ATTENDANCE:

Chairperson Carmen Hulu Lindsey
Trustee Leina'ala Ahu Isa
Trustee Dan Ahuna
Trustee Kaleihikina Akaka
Trustee Keli'i Akina
Trustee Luana Alapa
Trustee Brendon Kalei'āina Lee
Trustee Keola Lindsey
Trustee John Waihe'e, IV

BOT STAFF:

Colin Kippen, COS
Amber Kalua, Trustee Aide
Kanani Iaea, Trustee Aide
Lehua Itokazu, Board Secretary

ADMINISTRATION STAFF:

Sylvia Hussey, Ka Pouhana / CEO
Casey Brown, Ka Pou Nui / COO
Raina Gushiken, CC
Everett Ohta, CC
Ramona Hinck, CFO
Kevin Chak, IT
Erin Nakama, IT
Wayne Tanaka, Public Policy Manager
Olan Leimomi Fisher, Interim Senior Public Policy Advocate
Robert Klein, Board Counsel

Call to Order

Chair Hulu Lindsey Calls the Board of Trustees Meeting to order for Thursday, October 7, 2021, at 10:02 a.m. Board Secretary, please do a roll call.

| MEMBERS | | | Present | TIME ARRIVED |
|-------------|--------------------|---------|---------|----------------------|
| TRUSTEE | LEINA‘ALA | AHU ISA | X | |
| TRUSTEE | DAN | AHUNA | X | Left MTG at 11:48 am |
| TRUSTEE | KALEI | AKAKA | X | |
| TRUSTEE | KELI‘I | AKINA | X | |
| TRUSTEE | LUANA | ALAPA | X | |
| TRUSTEE | BRENDON KALEI‘ĀINA | LEE | X | |
| TRUSTEE | KEOLA | LINDSEY | X | |
| TRUSTEE | JOHN | WAIHE‘E | X | |
| CHAIRPERSON | CARMEN HULU | LINDSEY | X | |
| | | | 9 | |

At the Call to Order, **nine (9)** Trustees are PRESENT, thereby constituting a quorum.

Chair Hulu Lindsey Thank you Trustees. Due to the threat of COVID-19, Governor Ige issued the most recent Emergency Proclamation related to COVID-19 Response dated October 1, 2021, that suspends parts of Hawai‘i Revised Statutes Chapter 92, Public Agency Meetings and Records to, among other things, enable boards to conduct business without any board members or members of the public physically present at the same location. The OHA Board of Trustees will hold virtual meetings until further notice. The virtual meetings can be viewed and observed via livestream on OHA’s website at www.oha.org/livestream

I will over some quick announcements. Please mute your mics when you are not speaking. We are recording today’s meeting for the sole purpose of producing written minutes, which will become the official record of this meeting.

Joining the Trustees today is my staff Colin Kippen-COS, my Aides-Kanani Iaea and Amber Kalua, and our Board Secretary-Lehua Itokazu. Robert Klein, our Board Counsel, is not online yet but I will call on our Pouhana, Sylvia to announce who is joining us from administration.

Sylvia Hussey, CEO Thank you Chair and good morning Trustees, Chair, we have COO-Casey Brown, CFO-Ramona Hinck, Senior Legal Counsel-Raina Gushiken, Assistant Senior Legal Counsel-Everett Ohta, as well as Wayne Tanaka-Public Policy Manager, Leimomi Fisher-Interim Senior Public Policy Advocate as well as our IT staff-Kevin and Erin, thank you.

Approval of Minutes

- A. July 29, 2021
- B. August 11, 2021
- C. August 19, 2021

Chair Hulu Lindsey Can I get a motion to approve the minutes.

Trustee Lee Moves to accept the minutes.

Trustee Akaka Seconds the motion.

| Approval of Minutes: July 29, 2021 August 11, 2021 August 19, 2021 | | | | | | |
|---|---|---|--------------|----------------|----------------------|---------|
| | 1 | 2 | ‘AE (YES) | ‘A‘OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| TRUSTEE LEI AHU ISA | | | X | | | |
| TRUSTEE DAN AHUNA | | | X | | | |
| TRUSTEE KALEI AKAKA | | X | X | | | |
| TRUSTEE KELI‘I AKINA | | | X | | | |
| TRUSTEE LUANA ALAPA | | | X | | | |
| TRUSTEE BRENDON LEE | X | | X | | | |
| TRUSTEE KEOLA LINDSEY | | | X | | | |
| TRUSTEE JOHN WAIHE‘E | | | X | | | |
| CHAIRPERSON HULU LINDSEY | | | X | | | |
| TOTAL VOTE COUNT | | | 9 | | | |
| MOTION: [X] PASSED [] DEFERRED [] FAILED | | | | | | |
| Motion passes with nine (9) YES votes and zero (0) EXCUSED vote. | | | | | | |

Chair Hulu Lindsey Thank you. Do we have any one signed up for public testimony or community concerns?

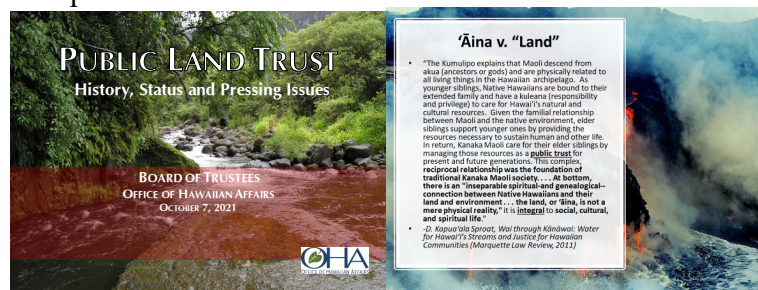
Board Secretary There is no one signed up for testimony.

New Business

Chair Hulu Lindsey Okay, I will now call on Sylvia for our next item under new business.

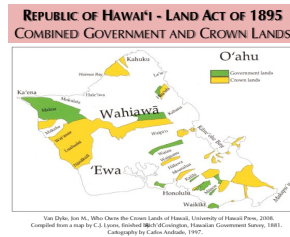
Sylvia Hussey, CEO Thank you Chair, we have Wayne, our Public Policy Manager. The presentation that he will give was also presented at the Nānākuli Board. It is always informative to be reminded about the roots of the public land trust, the responsibilities, and the obligations. The deck itself is a valuable resource in terms of just referring to that, so I hope you find that as well.

Wayne Tanaka, Public Policy Manager Good morning, everyone. Thank you Ka Pouhana, thank you Chair for this opportunity to talk about the ceded lands and the public land trust. In my time here over the nine years now, this has been a consistent theme and one that I've come to appreciate. I really appreciate this opportunity to talk about these issues and contextualize them particularly with respect to the Office of Hawaiian Affairs (OHA) and our reason for existing. Before I began really quick caveats, I want to be very mindful that there are multiple perspectives in all areas of life, but particularly to the extent of Hawaiian cultural concepts and the history of the islands. I do want to acknowledge that. Also, we don't have all day and I've been told on multiple occasions to keep things simple in the various presentations. I'm just going to highlight what I think are major or general points that are relevant to this discussion, try to apply some of what I think are completely reasonable interpretations towards the end. I also will note that I am not trying to speak for the lāhui but to an extent, I do provide a personal perspective. I am speaking as an attorney whose job has had to deal with the consequences of injustice over the last decade; also, as someone who believes that anyone living in Hawaii and loves these islands should care about the pressing need for justice here. With that I will start the slide presentation.



I want to say mahalo to Leimomi Fisher and Everett Ohta for their contributions to this slide deck and the research that went into it. Quick outline of the presentation, I'll talk about the Native Hawaiian perspective on ʻāina versus the Western view of land and a little bit about the history of land tenure in Hawaiʻi which leads us to what the ceded lands are. I do want to talk a little bit about the consequences of the loss of ceded lands and the loss of governance and how those events have and will continue to impact our beneficiaries today. I will then touch on the Public Land Trust (PLT), OHA's kuleana, and at the end, a summary overview on some of the legislative issues impacting Hawaiians' claims to the ceded lands and other PLT issues that we've seen.

I think it's really important to understand that the traditional Hawaiian perspective of ʻāina is very different from the Western perspective. Land is something that can be owned, bought, sold, commodified, and there's lots of sources you can look to, the Kumulipo is one that really explains how Native Hawaiians are related, not just physically, but genealogically to all of the living things on the islands. Kapua Sproat, she provides her interpretation of how this familiar relationship results in an understanding of reciprocity. You take care of the things that take care of you, your parents, your grandparents, and so on. It is a very different concept than the view of land that can be commodified. It is a public trust where you take care of the land, you don't own it. This is reflected in the early kingdom land tenure system. The konohiki oversaw the resources of the land and makaʻāinana worked the land, but nobody really owned the land to the point where you could alienate it; this was reflected in the 1840 constitution. During this time, it was a difficult and challenging time in the islands, you're seeing the decimation of Native Hawaiian population. There's introduced diseases,



- Loss of lands and governance and distribution of power after annexation:
- Continued alienation of "ceded" lands
- Affirmed taking of crown lands
- Dominated konohiki fishing system
- Expanded stream diversions, displacement
- Suppression of language, national and cultural identity, promotion of Americanization and "patriotism" in public schools
- Governor Dole and plantation oligarchy
- Vetted progressive legislation (healthcare, tax relief for the poor) passed by Native Hawaiian dominated legislature
- Undermined vision and implementation of the HICA
- Etc.
- Generational trauma and impacts continue to be seen today

You can see the different land holdings in O‘ahu as one example. Native Hawaiians almost immediately started to fight to get their land back. The Hui Aloha ‘Āina combined the patriotic leagues to support the Queen right after the overthrow. President Cleveland sent James Blount to come and figure out what was going on. Based on his report, President Cleveland withdrew the initial treaty of annexation. They also helped to gather the Kū‘ē Petitions which were very instrumental in stopping the second treaty of annexation that was proposed in 1897. There is continuous and immediate mobilization to restore the monarchy up and through annexation. Again, that is an indication that Hawaiians never relinquished their claim to the ceded land corpus. In 1898, there was a joint resolution passed in the US Congress that would annex Hawai‘i to become a part of the United States. Through this annexation process, the 1.8 million acres of those crown and government lands were ceded by the Republic to the US government and so that becomes the ceded lands. I just want to reflect on some of the consequences of this theft of lands and loss of governance. To understand where we are today, it’s good to reflect what justice means. In some sense and context, it may mean understanding and healing the harms that are inflicted by a wrongful act. That is a reasonable interpretation of what justice means. If this is something we want to seek then the first thing is to understand what the harm and consequences were of the takeover and annexation of Hawai‘i. In our context, we need to understand how Native Hawaiians uniquely were affected and impacted then. For now, I want to say even after the annexation, it didn’t stop Native Hawaiians from organizing. They were denied the vote under the Republic for the most part but under the annexation, the US Constitution applied and restored suffrage. Not for everyone obviously, but they were able to get the vote and there was massive organizing to elect individuals into office to regain some level of governance. There are lots of quotes in newspapers that people were very aware of what happened and the desire of people trying to fix what went wrong. They were successful, they took over the territorial legislature, they got delegates to Congress. Despite all of this because they were a territory, the Executive Branch of Governors were appointed so they were able to control a lot of what was going on including many ways the distribution of land, governance, and power went. The plantations continued to expand their power. They affirmed that the crown lands were not a thing and it was a part of the one corpus that was ceded to the US. This is just examples of what was going on while many other things were going on too. They took down the konohiki fishing system, stream diversions were expanded, suppression of language and cultural identity. These are just some examples on how there will be tremendous traumas to impacts that will persist through generations. I really like Dr. Kaholokula’s reflection in terms of understanding how the decisions made over resources, for how systems are set up can impact things like safety, availability of resources, food, education, healthcare, and how all these things can contribute to the impacts of historical determinants that we see today.

To summarize, these ceded lands that were taken during the overthrow and ceded to the US government. Native Hawaiians have never relinquished their claims and have continued to fight for their claims. If justice means addressing and fixing harms that have been inflicted, the just requires impacts to be understood and to the extent possible, to be healed. Our official policy is to oppose any ill nation of ceded lands except for very narrow situations. We’ve engage in a 15 year lawsuit to protect the ceded lands from being eliminated. The Public Land Trust (PLT) was created as a condition of Hawaii’s admission to the United States as a State. So, certain ceded lands that were transferred upon Statehood, these are subject to the PLT. The

Admission Act required that these lands be used for five purposes. 1) the betterment of the native Hawaiians but as you know after Statehood, the revenues from the PLT corpus was almost exclusively used for education instead of any of the other purposes. There was a development boom that had a huge impact on Native Hawaiian communities. Governors are now elected and there is now a democrat uprising where John Burns became Governor and he appoints William Richardson to the Supreme court and you start seeing some conscious raising, reflecting on the stigmas, the culture suppression that has been ongoing from the last several decades. Then in the 1970s, you have the second Hawaiian renaissance, the revival of cultural traditions, the desire to reconnect to things, and you see more and more political activism. These are groups that fought for DHHL, HDEA's implementation, Kalama valley evictions, Waiāhole, occupation of Kaho'olawe; this led up to the 1970 Constitution Convention. Article 12, you can really see the desire to address the ongoing impacts that stem from colonization and the overthrow. Some of the Constitution provisions included the establishment of OHA. One of OHA's task was to manage increment proceeds of the PLT basically saying that you can not spend all of the PLT money on education, some actually has to go to Native Hawaiians via an agency that elected by Native Hawaiians to cover a whole prerogative on how those funds should be spent. The legislature did specify in 1980 that the pro rata share should be 20% of all funds that derive from the PLT corpus and the OHA would be the one that expended these funds. When you say 20%, what revenues are you talking about? OHA was receiving \$1.5 million dollars a year in revenues through the 1980s which OHA felt it was very deficient. After many lawsuits, eventually we were able to come to an agreement after Governor Waihe'e became elected to see where OHA and the State could agree as to what revenues will be subject to this 20%. ACT 304 was enacted in 1990 and as you know it was repealed, but the formulas and principles in this act continue to be relevant today. They do reflect an agreement between the State and OHA on what revenue streams should be subject to the PLT to Native Hawaiians. So, they came up with this proprietary sovereign distinction, anything that the government generates from the PLT land as it can only do as a government entity, these are sovereign revenues with taxes, fees, and fines. These are sovereign so they are not subject to the PLT pro rata share but anything the government generates that any landowner can generate like lease rent, concession contracts and those kind of things. Another important thing of Act 304 was the agreement because we do not determine how the State manages the PLT lands, how they spend or maintain, or invest in these lands. The Native Hawaiians share should be off the gross and not the net revenues. The State can't deduct or say *we have to fix this structure so we don't have to give you that part of the revenues*. Again, these are the agreements that we understand today. Act 304 also included interest for back payments. We did receive a back due amount of \$103 million for the underpayment from 1980 and 1981; and under Act 304, we are getting about \$50 million a year. Act 304 represents what we agreed with the State were subject to Native Hawaiians' pro rata share. There are some things that we are in dispute such as duty free receipts in Waikīkī, the airport, hospital revenues, affordable housing revenues, and interest. We sued and actually won that lawsuit. Almost immediately, the Governor and the airlines started to say that we will bankrupt our economy. Then in the forgiveness act in 1977, was to prohibit any transfer of federally funded airport revenue outside of the airports. So, we were receiving airport revenue as part of the PLT pro rata share and in 1997, they passed the forgiveness act that says OHA can keep the money they got already but no more money goes to OHA from the airports. Again, as we know repeatedly, this was not intended to decrease the State's obligations to Native Hawaiians under the PLT but really needs to find other ways to make up for not being able to access these revenues directly. Then, the Supreme court reversed the decision and that we won and basically said that Act 304 did allow for airport receipts to be transferred to OHA; it conflicts with federal law and its own terms, its invalidated. Governor Cayetano stopped transferring any revenues to OHA. Next, Linda Lingle runs for Governor, during her campaign one of the debates there was a question about what will she do about the PLT issues and she made commitments that we were able to hold her to. We were able to get Act 178 passed in 2006 where there is an interim amount, \$15.1 million, to be transferred to OHA each year as reflective of Native Hawaiians' 20% share. There was a transfer of revenues for under payments when we weren't getting any PLT revenues.

Act 70 also requires DLNR to account for all receipts from the PLT and XEO-06. The executive order that implements Act 178, under the co, each agency accounts for 20% of the PLT revenues and transfers it to OHA. Because all of these agencies are sending us money and the amount may add up to more than the \$15.1 million a year, anything above that we must return to a carry for trust holding account. The vision was to have this as a safety measure in case there was a shortfall to the \$15.1 million. As you know, there has not been a shortfall for a very long time. The next big PLT action was Act 15, this was a recognition. After many years, we were able to come to an understanding with the State. The State owed Native Hawaiians approximately \$200 million in past due PLT revenues and based on this \$200 million evaluation, we got ten parcels of land in Kaka‘ako Makai (KM). In exchange, we said we wouldn’t sue for anymore for the money from 2012 going back. So, what do we do with these PLT revenues? How is tied into the ceded lands? This last year, we were able to indicate that 92% of our budget is derived from PLT sources. So, what we do with these monies? Part of it is invested into things like our grants. 2010-2018, \$11.8 million for our Maui Ola strategic objective, \$32.3 million for education, \$47 million economic self-sufficiency. A big part of these monies can go towards investing in these areas that actually seek to address some of these long-lasting consequences of the overthrow and the injustices. We also invest in research, advocacy, litigation, and partnerships. Every year since 2013, there has been an overage. Currently there is about \$27 million in the Carry Fortress Holding Account (CFHA). Looking at what the State has historically agreed to as being subject to Native Hawaiians pro rata share of the PLT, looking over the past ten years, the average of 20% has been more like \$40 million rather than \$15.1 million. Even if we did get all of this money, I think we should sit back and look at it as a partial remedy in terms of healing the harms that we are continuing to deal with. Recently, a big thing that has come up is proposals to lease ceded lands for 99 years at a time. If your truck is stolen and leased out for 99 years, you’ll never get it back; and even if they promise you 20%, they’re really just giving you 7% maybe. Until Native Hawaiian claims are addressed and resolved, ceded lands need to be properly maintained and definitely not sold and not leased for a century at a time; and justice means not just addressing the theft of ceded lands but also addressing results in harms that occurred when these lands were stolen. To emphasize where OHA fits in for the ceded lands part of our task, is to hold title to land entrust for Native Hawaiians, exercise control over these lands, our statutory responsibility includes the bettering the conditions of Native Hawaiians, looking at other agencies advocating for Native Hawaiians, and serve as a reciprocal for reparations. Really, what you see is the kuleana of OHA to seek justice and to seek reconciliation. So, adjusting impacts of the loss of ceded lands by receiving lands and reparations and holding agencies accountable to justice and reconciliation. It is not just money that is needed to remedy these historical losses but land itself including respective sovereignty. If we lose the ceded land corpus, we lose the basis of reconciliation, just one of our reasons for existing. In this arc of history, OHA has fought to uphold our governance claims. Again the PLT is held by the State as oppose to Native Hawaiians. The Constitution confirms there has to be some benefit that *inaudible* to Native Hawaiians from the PLT, and the Board of Trustees are tasked to manage and have prerogative over those revenues. In regard to PLT, our kuleana is to receive and exercise prerogative over the Native Hawaiians’ full PLT share subject to fiduciary obligations; not just to take what we get but to seek to make sure we’re getting what we are supposed to be getting. Beyond just the justice, issues and concerns on the broader level, I think there is a growing recognition that the traditional consequences to the pae ‘āina is interconnected as holistic as a public trust to something that more and more people are recognizing as maybe key to our future wellbeing in terms of environmental, health, climate change, social economic, and food security. The reason to extent that, we can restore Hawaiian governance to these lands and that may be a way to restore this traditional understanding of ‘āina vs. Land. This past session there was a measure to increase the \$15.1 million pro rata share amount that was suppose to be an interim amount from 15 years ago. It would have lifted that \$15.1 million cap and transfer the CFHA funds to \$27 million and establish a negotiating committee. We supported this but it died in the House. There was a similar bill that would do that but it would divert the PLT revenue to the Department of Hawaiian Home Lands (DHHL). We did not like this and fortunately it did not pass. The takeaway is Native

Hawaiians have never relinquished their claims to the ceded lands. These lands must be properly protected, or these claims could be lost, and justice requires looking at the harms that have arose from the theft of ceded land and healing those harms as well. This one step towards justice and upholding it's part of this bigger picture of trying to seek justice. When you look at how it was created and by who it was created and what our roles and obligations are, our existence is really a part of a continuous 100 year old fight for justice of theft of 'āina and governance. Things reflect on what we've done and what we can do. We have met with legislators, advocates, we've created action alerts on major bills, we research and education, and potential legal interventions that we explore. In the meantime, looking at the opponent, we can support our beneficiaries, empowering them, making sure they have the knowledge and tools they need to advocate. That is the presentation. I know it's a lot of information but it's important to have a big comprehensive picture of these major issues and our role in seeking justice. I'm happy to answer any questions.

Trustee Ahu Isa I wanted to wish you well. I was in the House when Cayetano did that, he stopped all the payments. I was so mad, I switched parties. It was horrible. Anyway, going back to this, the airport revenues, they were mean to take that out so that made our share even smaller. I know since I've been elected, we have been trying to work on this together. We have that negotiating committee and we've met only once. I've made copies for the trustees about when will we meet again. What happen to that committee? I think Jocelyn was mentioned in that Civil Beat article I sent you. So, its still alive or it's dead? Now, with a new election year different people get elected into office. Representative Holt knows about it. What happened to that?

Wayne Tanaka, Public Policy Manager The committees deadline expired. We took a break in 2017. In terms of including stuff from the package was to include your work with the negotiating committee to convert the proposal, they could then go forth in 2018. They never met and the timeline expired. That is when we put our PLT bill. We wanted to lift the cap, get back to transfer the CFHA, and establish the negotiating committee via the bill so that it would be more forceable. The negotiating committee would meet periodically so that we would not have to wait 15 years just to get an update on the PLT amount.

Trustee Akaka I just want to say mahalo for your thorough presentation and for all of your good work through the years. Mahalo nui Wayne.

Wayne Tanaka, Public Policy Manager Thank you Trustee.

Trustee K. Lindsey Question about the airport revenue, could a future Federal Act mandate the State to pay those revenues again since the existing one stopped it? I know it's a process to get there but just hypothetically speaking.

Wayne Tanaka, Public Policy Manager It has been something that has come up in discussion before. Any airport that gets federal monies can't divert it's revenues outside of the airport. Without impacting what is in place, you would have to come up with something to carve out specifically for Hawai'i to find the exception for that. It's one option to look at to get revenues that should be acoounted for in terms of the 20%. We still need to address the cap issue, right now its \$15.1 million. If the State made more money from all over the place, we are still going to get only the \$15.1 million.

Chair Hulu Lindsey Was that Federal Act only related to Hawai'i's airports?

Wayne Tanaka, Public Policy Manager There is a general overarching requirement that applies to all airports and even though it was interpreted differently prior to '96-'97, they looked at this old law and said the airport revenues can't be diverted like Act 304 and how OHA is saying it should be accounted for. The

pro rata share should come from the airports too. The forgiveness Act specifically looked at saying OHA doesn't have to give the money back but it affirms the new interpretation at the time that Federal revenues of federally funded airport revenues can't go outside of the airport, effectively that cut us off from receiving all PLT revenues from the airport.

Trustee Ahu Isa I got a text from a beneficiary that is watching us today. He said while the presentation is good, at the end of the day what does it matter? What do we do now? That is where planning and strategy comes in. Does OHA have plans?

Chair Hulu Lindsey I think we can tell our beneficiaries that we are looking at this very seriously for the next legislative session and strategizing what are next moves will be. The reason I asked about that Act is because I was wondering if we could repeal the portion that affects Hawai'i? Our islands are different from any place else in the Forgiveness Act. Just food for thought. Any more questions?

If not, Wayne, thank you for bringing us up to date. We are going to miss you and we wish you well in your next journey. Mahalo nui.

Executive Session

Chair Hulu Lindsey Can I get a motion to recuse ourselves into Executive Session pursuant to HRS§92-5.

Trustee Akaka Moves to recuse into Executive Session.

Trustee Ahu Isa Seconds the motion.

The Board recuses into Executive Session at 11:07 a.m.

| Motion to recuse into executive session pursuant to HRS Section 92-5 | | | | | | |
|---|----------|----------|----------------------|------------------------|------------------------------|----------------|
| | 1 | 2 | 'AE (YES) | 'A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| TRUSTEE LEI AHU ISA | | X | X | | | |
| TRUSTEE DAN AHUNA | | | X | | | |
| TRUSTEE KALEI AKAKA | X | | X | | | |
| TRUSTEE KELI'I AKINA | | | X | | | |
| TRUSTEE LUANA ALAPA | | | X | | | |
| TRUSTEE BRENDON LEE | | | X | | | |
| TRUSTEE KEOLA LINDSEY | | | X | | | |
| TRUSTEE JOHN WAIHE'E | | | | | | |

| | | | | | | |
|--|--|--|----------|--|--|--|
| CHAIRPERSON HULU LINDSEY | | | X | | | |
| TOTAL VOTE COUNT | | | 8 | | | |
| MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED | | | | | | |
| Motion passes with eight (8) YES votes and zero (0) EXCUSED vote. | | | | | | |

Board returns to open session at 12:08 p.m.

Announcements

Chair Hulu Lindsey Our next BAE meeting is on October 13, Wednesday. On the October 19th, we have an RM meeting.

Adjournment

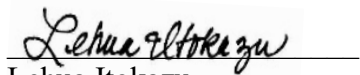
Trustee Akaka Moves to adjourn the meeting.

Trustee Ahu Isa Seconds the motion.

| Adjournment | | | | | | | |
|-------------------------|---------|---|---|--------------|---------------|----------------------|---------|
| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA | AHU ISA | | X | X | | | |
| DAN | AHUNA | | | | | | |
| KALEIHIKINA | AKAKA | X | | X | | | |
| KELI'I | AKINA | | | X | | | |
| LUANA | ALAPA | | | X | | | |
| BRENDON KALEI'ĀINA | LEE | | | X | | | |
| KEOLA | LINDSEY | | | X | | | |
| JOHN | WAIHE'E | | | X | | | |
| CHAIR CARMEN HULU | LINDSEY | | | X | | | |
| TOTAL VOTE COUNT | | | | 8 | | | |

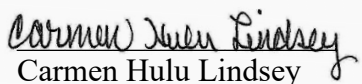
Chairperson Carmen Hulu Lindsey Adjourns the Board of Trustees meeting at 12:12 p.m.

Respectfully submitted,



Lehua Itokazu
Board Secretary

As approved by the Board of Trustees on December 29, 2021.


Carmen Hulu Lindsey

Chairperson, Board of Trustees

Attachments:

1. PLT - PowerPoint

PUBLIC LAND TRUST

History, Status and Pressing Issues

BOARD OF TRUSTEES
OFFICE OF HAWAIIAN AFFAIRS
OCTOBER 7, 2021



OUTLINE

1. Background:
 - A. Kingdom Land Tenure and “Ceded” lands
 - B. Public Land Trust (PLT)
2. PLT Review
 - A. Recent History
 - B. Current Annual PLT Amount Far Too Low
 - C. Proposed Resolution





WHAT ARE “CEDED” LANDS?

‘Āina v. “Land”

- “The Kumulipo explains that Maoli descend from akua (ancestors or gods) and are physically related to all living things in the Hawaiian archipelago. As younger siblings, Native Hawaiians are bound to their extended family and have a kuleana (responsibility and privilege) to care for Hawai‘i’s natural and cultural resources. Given the familial relationship between Maoli and the native environment, elder siblings support younger ones by providing the resources necessary to sustain human and other life. In return, Kanaka Maoli care for their elder siblings by managing those resources as a public trust for present and future generations. This complex, **reciprocal relationship was the foundation of traditional Kanaka Maoli society. . . . At bottom, there is an "inseparable spiritual-and genealogical--connection between Native Hawaiians and their land and environment . . . the land, or ‘āina, is not a mere physical reality," it is integral to social, cultural, and spiritual life.**”
- -D. Kapua‘ala Sproat, *Wai through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities* (Marquette Law Review, 2011)



Early Kingdom Land Tenure System

- Land viewed as a public trust, part of mauili ola NOT a commodity
- Ahupua'a system: Maka'āinana worked the land, chiefs administered land and resources
- Under Kamehameha I, land tenure system remained substantially the same



MA
(ga

KAI
(dw

LO'
(tan

KAI
(dw

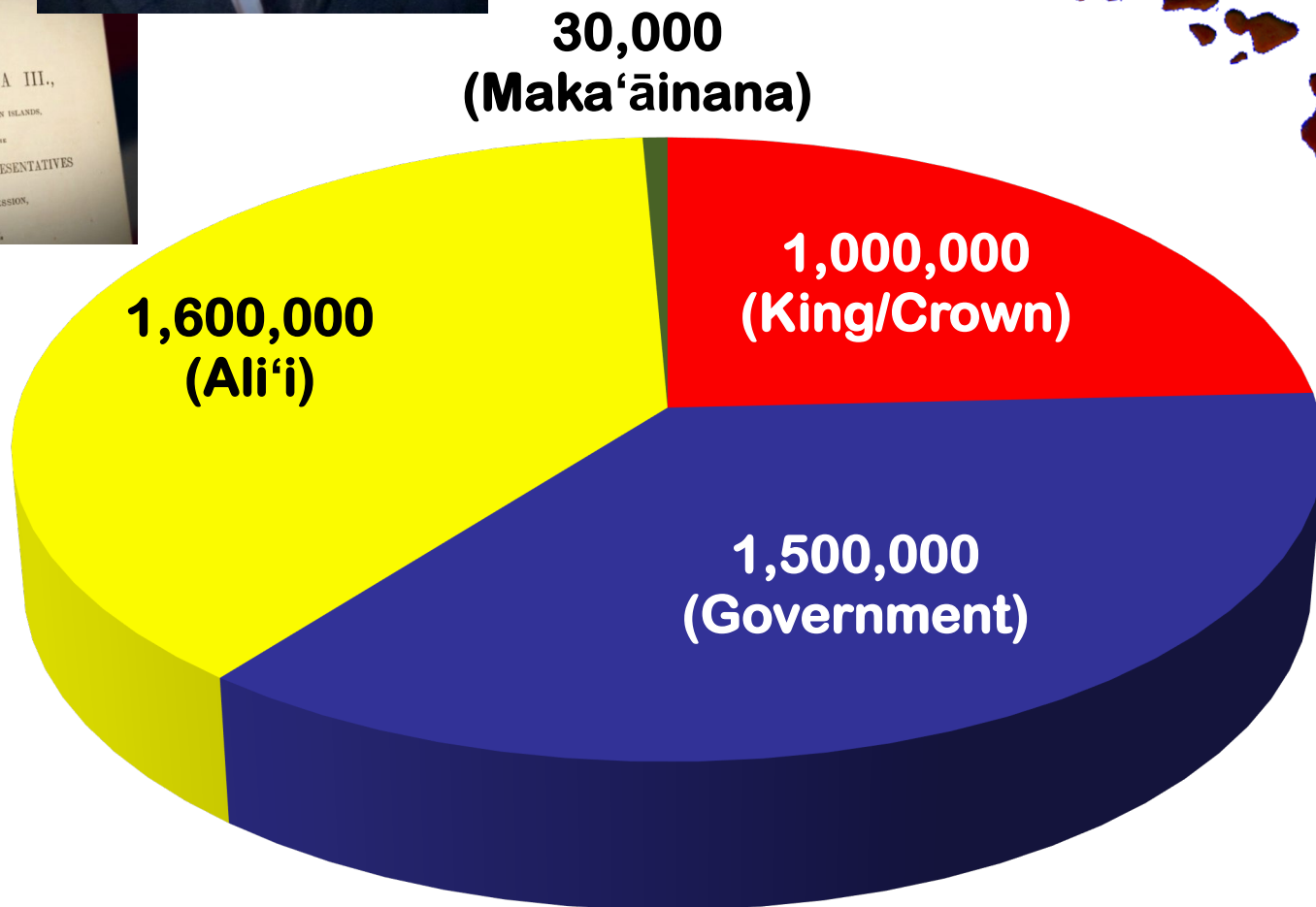
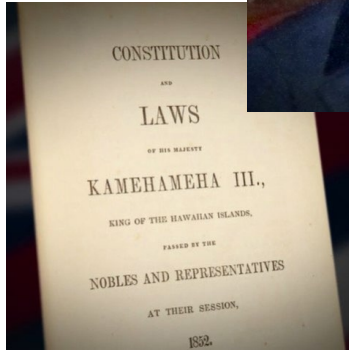
LOH
(fis

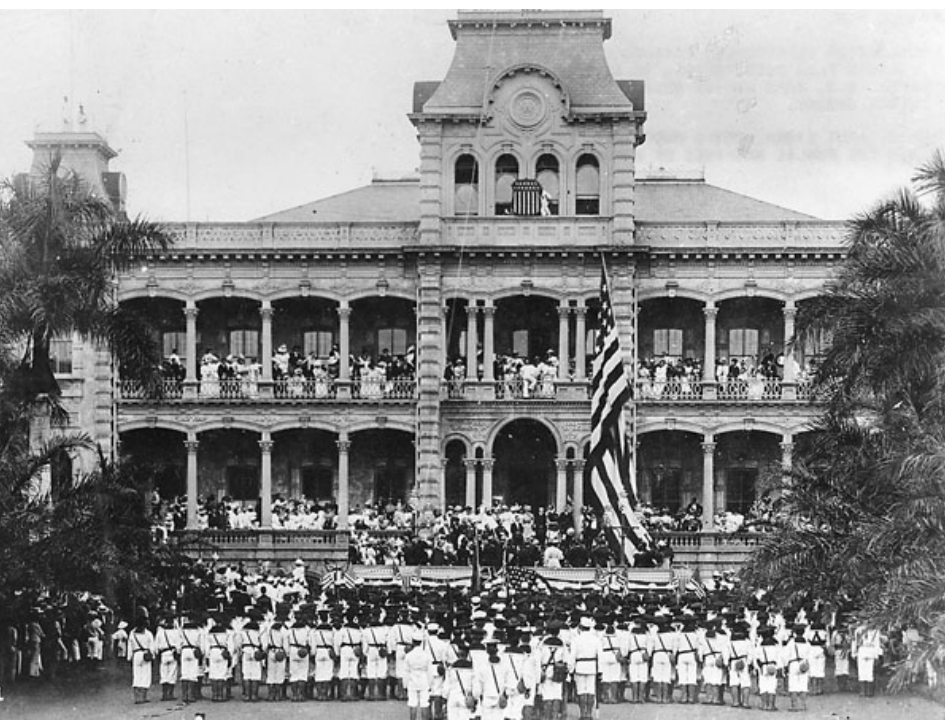
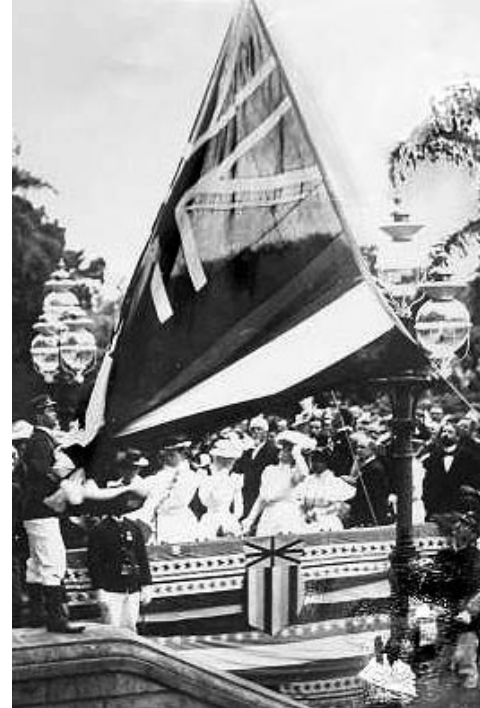
The Mahele

- 1840 constitution under Kamehameha III
 - KAMEHAMEHA I, was the founder of the kingdom, and **to him belonged all the land from one end of the Islands to the other, though it was not his own private property. *It belonged to the chiefs and the people in common***, of whom Kamehameha I, was the head, and had the management of the landed property.
- Increasing conflicts between Hawaiians and foreigners over land rights
- **Kauikeaouli's goal – secure land base, protect Native Hawaiian lands from foreigners through Western-recognized land tenure system (1/3 land to King, ali'i, and native tenants)**



1848 MAHELE 'ĀINA





1893
THE HAWAIIAN
KINGDOM IS
OVERTHROWN

Kingdom to the “Republic”

I am very sincerely yours

SANFORD B. DOLE

[*Dole to Burgess*]

Honolulu 31 March 1894

PROF. JOHN W. BURGESS

DEAR SIR: I wrote a few days ago asking you for an opinion on a certain point, and now I wish to trouble you still further if it is convenient for you to give your attention to our questions.

In drafting a new constitution the plan of an upper and lower house of the legislature will be adopted. Under the monarchy there were two classes of legislators who sat together and who were elected by voters having different qualifications. There are many natives and Portuguese who had had the vote hitherto, who are comparatively ignorant of the principles of government, and whose vote from its numerical strength as well as from the ignorance referred to will be a menace to good government.

It is proposed to make easy conditions for voting for members of the lower house, but to make difficult ones for the voting privilege for the upper house, such as educational and property qualifications, and to give the upper house the right with the lower to introduce money bills.

This plan will raise considerable opposition and will result probably in some permanent discontent, but those who insist on it say that it is the only plan by which the government can be kept out of the control of the irresponsible element,

¹ John W. Burgess, *Political Science and Comparative Constitutional Law* (Boston, 1890-91), II, 39. The passage quoted reads correctly: “It seems to me, however, that that form will be a republic. . .”

sincerely yours,

SANFORD B. DOLE

[At head of letter on page 1] Our election for the Constitutional Convention is May 2nd. and the Convention will probably follow in two or three weeks.

[*Burgess to Dole*]

Columbia College in the City of New York
School of Political Science

April 13/94

HON SANFORD B. DOLE

MY DEAR SIR: Your letter of March 31st is just received. If I understand your situation it is as follows: You have a population of nearly 100,000 persons, of whom about 5,000 are Teutons i.e. Americans, English, Germans and Scandinavians, about 9,000 are Portuguese [*sic*] about 30,000 are Chinese and Japanese, about 8,000 are native born of foreign parents, and the rest are natives.² You have, according to your late constitution, a law of suffrage, which allowed every male adult citizen having a certain slight educational qualification to vote for those members of your late legislative body called “Representatives”, and which required of the voters for those members called “Nobles” an additional, property qualification of a substantial sort.

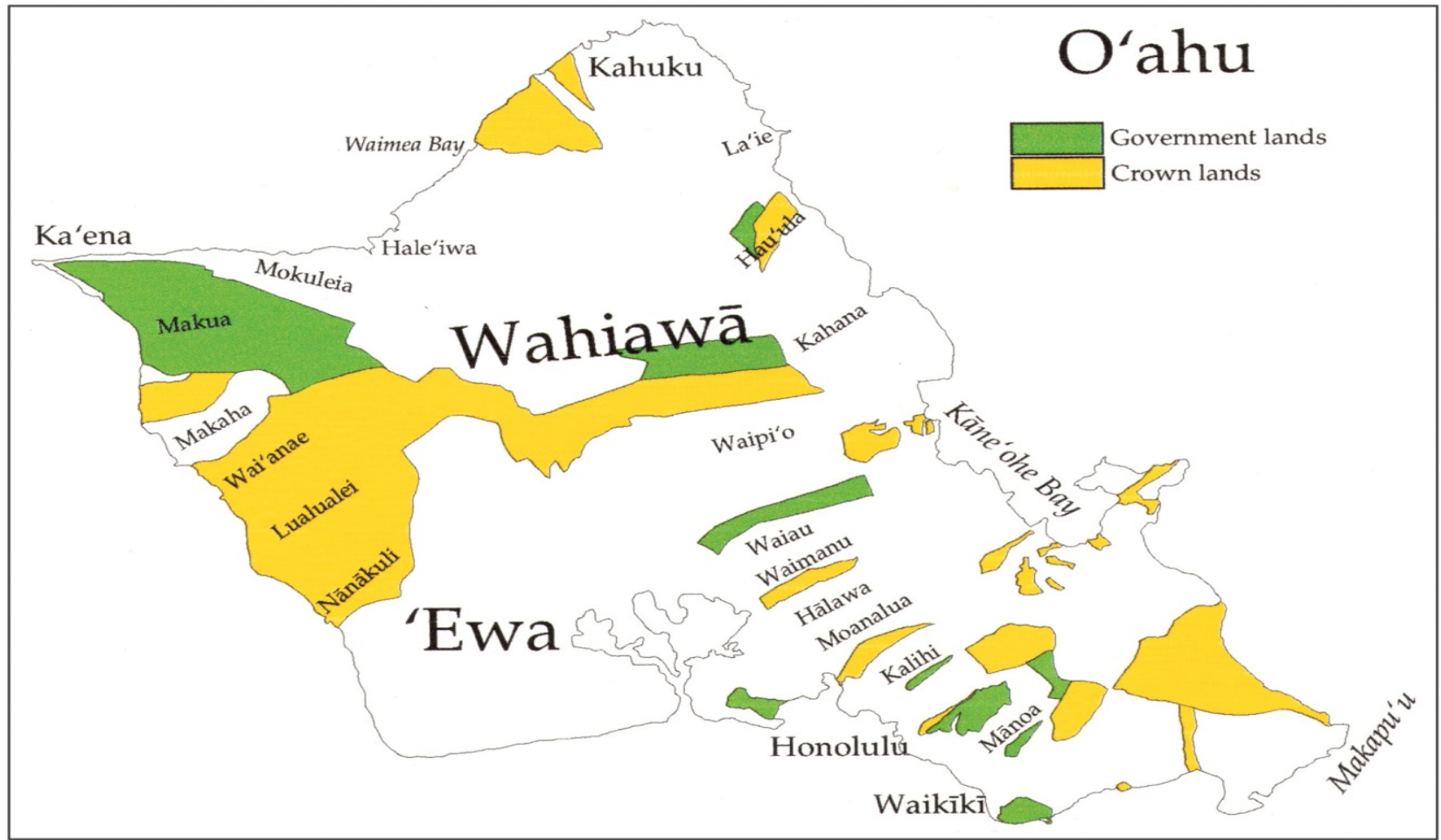
With this situation, I understand your problem to be the construction of a constitution which will place the government in the hands of the Teutons, and preserve it there, at least for the present. I think you can accomplish this with the existing material at your hand provided the Teutons are substantial [*sic*] united in purpose and will act harmoniously.

I would suggest that you establish a legislature of two houses, having the same number of members in each; that the voters for the members of the lower house should have the qualifications which your late constitution required of

² The total population of Hawaii in 1890 was 89,990; “Teutons” numbered 4533, Portuguese 8602, Chinese and Japanese 27,661, naturalized foreigners 7495, Hawaiians and part-Hawaiians 40,622.

REPUBLIC OF HAWAI'I - LAND ACT OF 1895

COMBINED GOVERNMENT AND CROWN LANDS



Van Dyke, Jon M., Who Owns the Crown Lands of Hawaii, University of Hawaii Press, 2008.
Compiled from a map by C.J. Lyons, finished by Rich'd Covington, Hawaiian Government Survey, 1881.
Cartography by Carlos Andrade, 1997.

1898: REPUBLIC OF HAWAI'I "CEDED"

~1.8 MILLION ACRES TO THE U.S.

Fifty-fifth Congress of the United States of America;
At the Second Session,

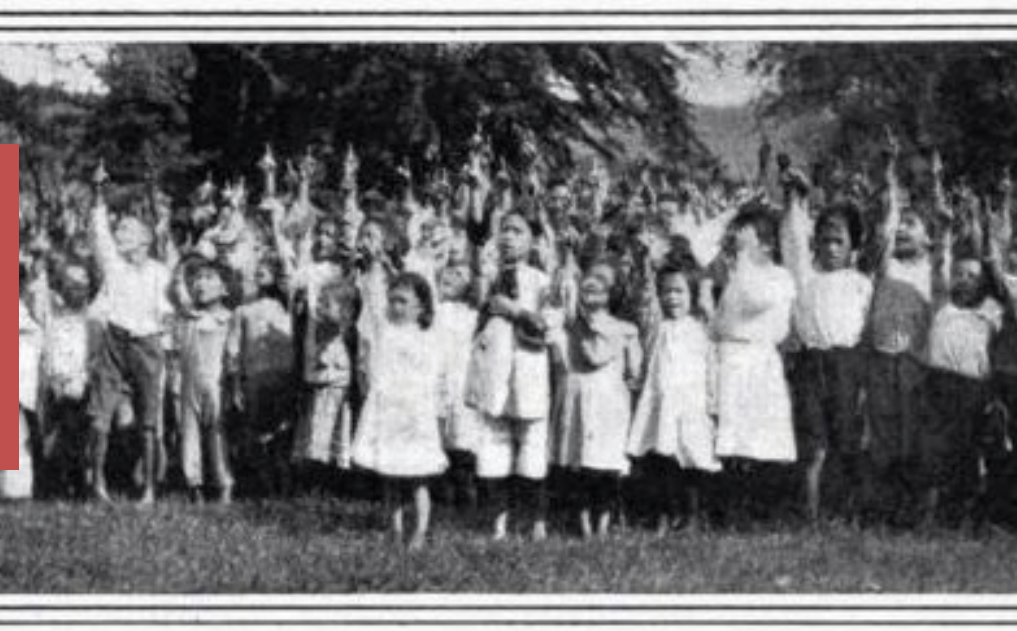
Begun and held at the City of Washington on Monday, the sixth day of December, one thousand eight hundred and ninety-seven.

JOINT RESOLUTION

To provide for annexing the Hawaiian Islands to the United States.

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and dependencies, and also to cede and transfer to the United States the all public, Government, or Crown lands, and all other





...e our heads and our hearts to God and our country! One country, one language, o
THE SALUTE TO THE AMERICAN FLAG WHICH FLIES IN THE GROUNDS OF THE KAIUA
JAPANESE PUPILS. THE DRILL IS CONSTANTLY HELD AS A MEANS OF INCULCATING PATRI
OF THE CHILDREN

The “Territory” of Hawai‘i

Loss of lands and governance and distribution of power after annexation:

- Continued alienation of “ceded” lands
- Affirmed taking of crown lands
- Dismantled Konohiki fishery system
- Expanded stream diversions, displacement
- Suppression of language, national and cultural identity, promotion of Americanization and “patriotism” in public schools
- Governor Dole and plantation oligarchy
 - Vetoed progressive legislation (healthcare, tax relief for the poor) passed by Native Hawaiian-dominated legislature
 - Undermined vision and implementation of the HHCA
- Etc.
- **Generational trauma and impacts continue to be seen today**

Loss of lands and governance: Impacts to Maui Ola

Consider how **the resulting political system and its decisions such as how resources are distributed and how public policies might favor the interest of one group over another**, can impact the **safety** (e.g., crime and environmental toxins) and availability of **resources** (e.g., walking trails and usable sidewalks) in a particular neighborhood, worksite, or public school system; how the safety and available resources of these environments can impact whether or not a person have **access to fresh fruits and vegetables, safe and clean parks**, and the best **educational opportunities**; how the availability and affordability of **healthy food options** and **physical activity venues** can affect whether or not a person **is obese or develops diabetes**; and how **access to quality health care** can prevent (or bring about), delay (versus early onset), or manage a person's health problems. Finally, consider how all **these factors are not equally distributed or accessible across communities and ethnic groups and how the added burden of discrimination, economic deprivation, and cultural threats can adversely impact these factors.** -- Joseph Keaweaimoku Kaholokula, Ph.D

“Ceded” lands”: Native Hawaiian Claims

- Native Hawaiians maintain unrelinquished claims to the “ceded” lands corpus
- Theft and decades of control of lands and governance and by a white supremacist oligarchy has uniquely impacted the health, culture, and well-being of generations of Native Hawaiians
- **Justice requires these unique impacts and harms and their underlying cause to be addressed**
- NOTE: OHA policy is to OPPOSE the sale or alienation of “ceded” lands except for limited situations (remnants, prior-approved sales of certain house lots in former Housing and Community Development Corporation of Hawai‘i affordable housing developments)
- OHA v. HCDCH lawsuit and HRS 171-64.7 settlement

A scenic view of a river flowing over a rocky waterfall in a lush green forest. The water is dark and turbulent as it cascades over mossy rocks. The surrounding area is densely packed with various green plants, trees, and ferns, creating a vibrant and natural setting. The text "WHAT IS THE PUBLIC LAND TRUST?" is overlaid in white, serif font on a semi-transparent dark red banner across the middle of the image.

WHAT IS THE PUBLIC LAND TRUST?

1900 ORGANIC ACT

TERRITORY OF HAWAI‘I (1900-1959)

- Imposed a trust on “ceded” lands, which were to be used “solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes”
- Territory controlled and managed “ceded” land, although generally did not hold title
- Notably, in some cases, title to “ceded” land did transfer to Territory (e.g., portions of Sand Island, some public schools)



Sand Island, O‘ahu

Admission Act: “Ceded” lands → Public Land Trust

- Certain “ceded” lands transferred to the state upon or after statehood (or acquired in exchange for such lands) subject to Public Land Trust (NOT HHCA lands, NOT lands retained by the federal gov’t, NOT lands transferred to the Territory before statehood)
- Admission Act Sec. 5 – Public Land Trust lands must be administered for 5 purposes:
 - Public schools/public education, **betterment of the conditions of native Hawaiians**, farm and home ownership, making of public improvements, lands for public use
- **BUT: After “statehood,” PLT revenues almost exclusively used for education**

§10-13.5 Use of public land trust proceeds. Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter. [L 1980, c 273, §1; am L 1990, c 304, §§7, 16]

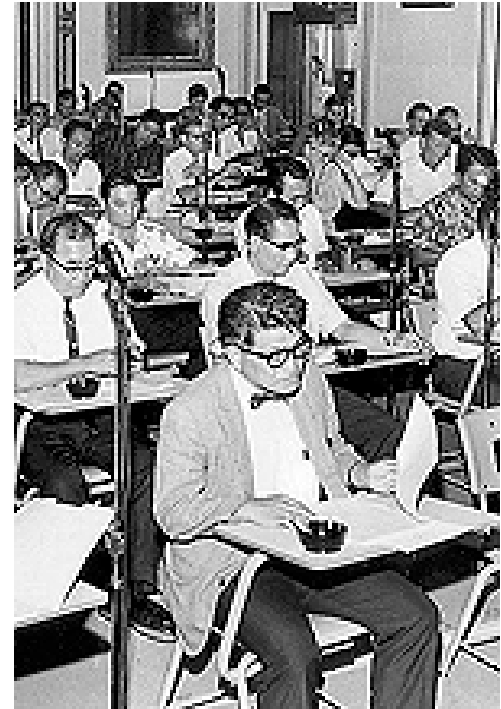
Public Trust SECTION 4. The lands granted to the State of Hawaii by Section 5(b) of the Constitution, excluding the lands defined as “available lands” by Article XVI, Section 7, of the State Constitution, shall be held by the State as a public trust for native Hawaiians and the general public.

Office Of SECTION 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the betterment of the conditions of native Hawaiians, in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be

1978 HAWAI'I CONSTITUTION, ARTICLE XII SECTIONS 5 & 6



Created the Office of Hawaiian Affairs to manage
all income and proceeds from that pro rata portion of
the public land trust for native Hawaiians*

OHA AND PLT



- In 1980, Legislature adopts **HRS §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.





20 PERCENT *OF WHAT?*

- With no clear formula, **OHA recieved about \$1.5 million annually in PLT revenues in the 1980s**
- In **1984**, OHA sued to recieve 20% of all income and proceeds derived from the state from sales, leases or other dispositions of various 5(f) Trust Lands
 - In **1987**, the Hawai‘i Supreme Court concluded that it was unable to determine the parameters of HRS Section 10-13.5 because the issue of how the 20% apportionment is formulated was **a political question for the legislature to determine** (Yamasaki)

ACT 304

NEGOTIATIONS

- OHA and Gov. Waihe'e entered into lengthy negotiations & submitted to the legislature an agreement to clarify the extent and scope of the 20 percent due to Native Hawaiians
- **Act 304 enacted in 1990**



Act 304 (1990)

Landmark legislation, **establishes formula to determine Native Hawaiians' share of PLT revenues**

- Establishes major historical agreements between the State and Native Hawaiians regarding PLT revenues:
 - **Proprietary** (20% is applied) **vs. Sovereign** (20% is not applied)
 - **Sovereign** = revenues which the state generates through exercise as a government through its sovereign functions and powers such as:
 - » Taxes
 - » Regulatory or licensing fees
 - » Fines, penalties, or levies
 - » Registration fees
 - **Proprietary** = revenues the state generates through its powers as a landowner:
 - » all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale, lease, license, permit, or other similar proprietary disposition, permitted use, or activity from PLT lands
 - **Net vs. Gross**
 - Because OHA does not determine how the state manages PLT lands, the Native Hawaiians' share is applied to gross revenues and not net revenues
- These historical agreements continue until today

ACT 304 PAYMENTS

- Act 304 included interest owed to Native Hawaiians for back-due payments
- In 1993, the state transferred \$130M to OHA for 1980-1991
- \$15M paid to OHA annually throughout 1990s





DISPUTED REVENUES

- In 1994, **OHA** sues over **disputed revenues not agreed to in Act 304**:
 - Waikiki Duty Free receipts connected to the Honolulu Airport
 - Hilo Hospital patient services receipts
 - Affordable housing project receipts
 - Interest
- In 1996, Judge Heely rules in **OHA's favor**

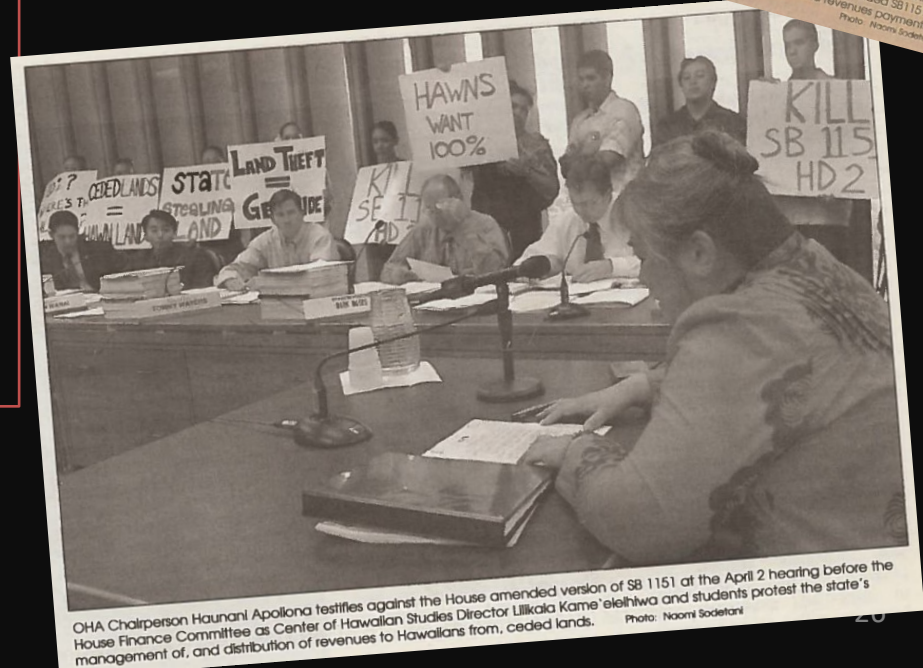
ACT 304 REPEALED

- In **1996**, Gov. Cayetano and airlines oppose Heely ruling
 - Airlines: ruling would result in “dire consequences for an economy so dependent on tourism.”
- In **1997**, Congress passes **Forgiveness Act**
 - Forgives state for \$28.2M in PLT transfers to OHA from airports
 - **Prohibits further PLT transfers to OHA from airports**
- In **2001**, Hawai‘i Supreme Court reverses Heely decision and repeals Act 304 because it conflicts with federal law re: airports
- Gov. Cayetano immediately stops all PLT transfers to OHA



OHA ATTEMPTS TO RE-ENACT ACT 304

In 2003, House leadership amends OHA's attempt (SB1151) to re-enact Act 304, by changing the formula to only allow the Native Hawaiians' share of PLT to apply to the raw, undeveloped value of PLT lands – **the bill died**



NEGOTIATIONS UNDER GOV. LINGLE

- In **2003**, Gov. Lingle issues EO 03-03, reinstating undisputed PLT revenue transfers to OHA dating back to 2001, when Gov. Cayetano stopped transfers
- Amounted to about \$9M per year
- Begins negotiations for going-forward and back-due PLT revenues to OHA



origin in the suit, 96 H. 388, 31 P.3d
[§10-13.3] **Interim revenue.** Notwithstanding the definition of revenue contained in this chapter and the provisions of section 10-13.5, and notwithstanding any claimed invalidity of Act 304, Session Laws of Hawaii 1990, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6 of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each of fiscal year 1997-1998 and fiscal year 1998-1999 shall be \$15,100,000. [L 1997, c 329, §2]

ACT 178 (2006)

Section 2: Established interim public land trust annual amount of \$15.1 million/year

Section 3: Requires agencies to collectively transfer at least \$3,775,000 in public land trust revenues to OHA each quarter

Section 4: Appropriated \$17,500,000 for underpayment between July 1, 2001 and June 30, 2005

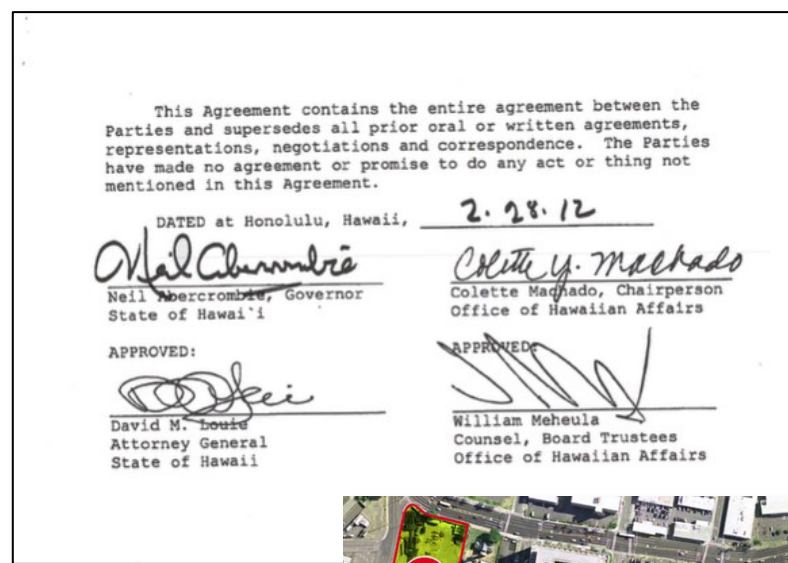
Section 5: Required DLNR to account for all receipts from the use of land within the public land trust

Executive Order 06-06

- Implements Act 178
- Each agency must account for, transfer 20% of PLT revenues to OHA
- Excess of \$3,775,000 per quarter (\$15.1M per year) must be returned to a “Carry Forward Trust Holding Account” (CFTHA)
- Shortfalls to be paid out of CFTHA, DLNR

ACT 15 (2012)

- First bill introduced in 2008; finally enacted under Gov. Abercrombie
- Settlement addressed ***past due*** revenue, including disputed revenues from Act 304 in 1993
- OHA released its claim to PLT revenue 1978 through 2012
- OHA received 10 parcels in Kakaako Makai, valued at about \$200 million



PLT Revenues and Maui Ola: Grants

NOTE: PLT – derived
revenues = **92% of OHA's
annual \$40M Budget**
(\$15.1M Annual PLT
Share, NHTF, Kaka'ako
Makai Revenues)



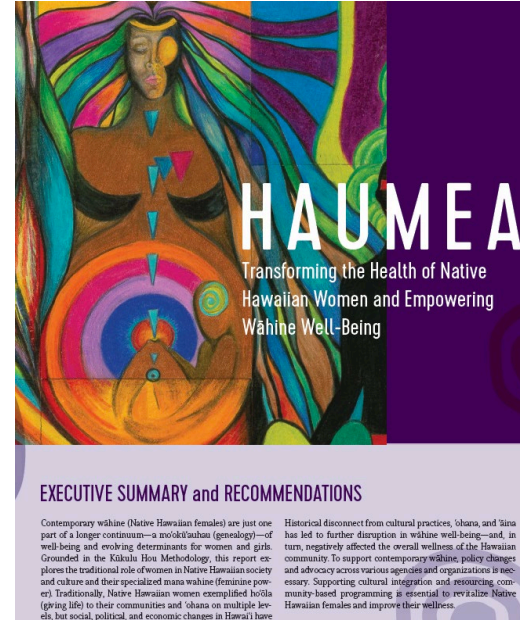
\$11.8M in grants to
promote healthy lifestyles,
reduce chronic disease
from 2010-2018

Also:

- \$32.3M for Ho'ona'auao
- \$47.3M for Ho'okahua Waiwai
- \$16.8M for 'Āina
- \$9.6M for Mo'omeheu
- \$4.4M for Ea

PLT Revenues and Maui Ola: Other Investments

- Research
- Advocacy
- Litigation
- Partnerships

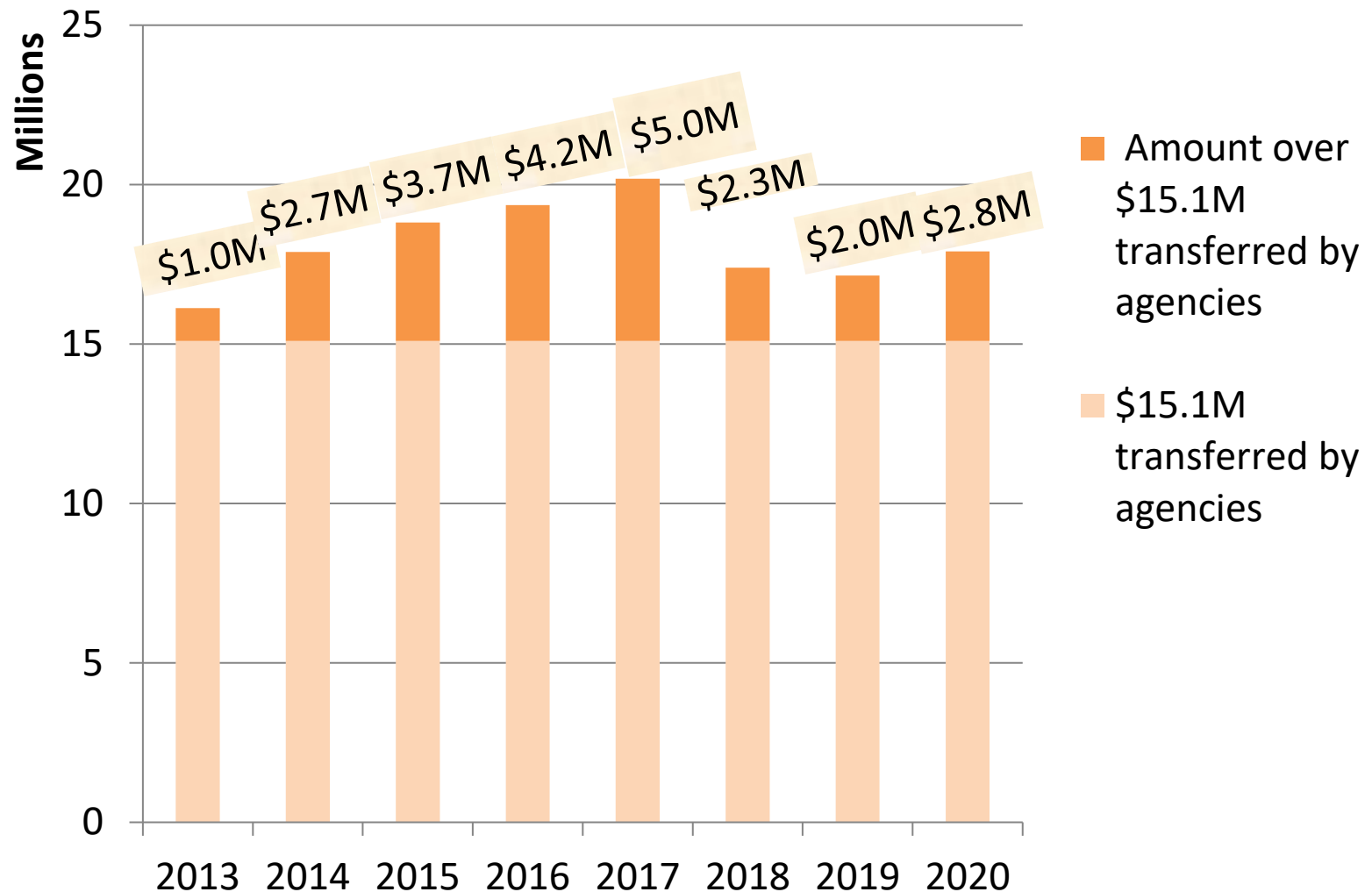


A scenic view of a river flowing through a lush green forest. In the foreground, a large, mossy rock is partially submerged in the water. The river flows over a bed of smooth, reddish-brown rocks. The background is filled with dense green foliage and trees, with a mountain peak visible in the distance. The text is overlaid on a semi-transparent red banner across the middle of the image.


**10 YEARS OF REVENUE DATA:
THE ANNUAL PLT AMOUNT GIVEN TO OHA
FOR THE BETTERMENT OF NATIVE HAWAIIANS
IS FAR TOO LOW**

OHA-RETURNED FUNDS TO TRUST HOLDING ACCOUNT FISCAL YEARS 2013 - 2020

Currently the CFTHA
holds ~\$25,000,000



OHA'S REVIEW OF PLT RECEIPTS

| PLT REVENUE SOURCES WITH: | TOTAL REVENUE | 20% OF REVENUE | COMBINED SHARE OF REVENUE |
|--|---------------|----------------|--|
| <p>1. Historical Agreement between OHA and the State:</p> <ul style="list-style-type: none">A. Revenue sources that the State currently transfers to OHA, per Act 178B. State accounting errorsC. Inconsistent transfers (some/same agencies transfer similar revenue sources, some do not)D. Past precedent (agency transferred from exact revenue sources in the past) | \$197,433,474 | \$39,486,695 |  \$39,486,695 |

“Ceded” Lands v. PLT

“Ceded” lands

- ALL lands taken by overthrow, “ceded” to U.S.
- Must be maintained until resolution of Native Hawaiian claims
- Potential land base for future Native Hawaiian governing entity
- NOTE: Theft of lands and governance is a major source of challenges facing Native Hawaiians today

Public Land Trust

- Subset of “ceded” lands transferred to state and held in trust for five purposes
- Native Hawaiians, through OHA and its Board, entitled to 20% pro rata share of revenues
- **Revenues used by OHA to address some, but not all of the impacts of the theft of lands and governance**
- Native Hawaiians’ pro rata share must be updated by legislature*
(*has not been updated since 2006)


“Ceded” Land v. PLT

- “Ceded” lands = your car and belongings are stolen
- Public Land Trust = a promise to pay 20% of money made from renting car to tourists
 - If car is sold or rented for 99 years, you will never get car back
 - Car is being rented for cheap, not maintained properly
 - **You actually are only getting 10% of the promised rental money**



RESOLUTION: INCREASE PLT FUNDING FOR NATIVE HAWAIIANS

- 1. Recites history of PLT (1978-), up to and including Act 15 (Kaka'ako settlement)**
- 2. Emphasizes legislature's responsibility to determine pro rata amount (*Yamasaki, OHA I and OHA II*), and the "temporary" nature of Act 178's \$15.1 determination**
- 3. Recites data re: revenues from historically agreed-upon revenue streams (\$39.5M/year), CFTHA amount (\$25M)**
- 4. Urges legislature to:**
 - 1. Update PLT amount to \$40M/year (\$9.75M/quarter)**
 - 2. Transfer CFTHA \$\$\$ (\$25M) to OHA**
 - 3. Transfer back-due amount of \$239,000,000 for what OHA should have received since 2012, had the PLT amount been established as \$40M**
 - 4. Establish a PLT negotiating committee to periodically revisit PLT amount (Senate President, House Speaker, Governor, OHA Chair)**

A photograph of a large crowd of people gathered in front of a building with classical architectural features, including columns and arches. Many individuals in the crowd are holding flags, with the Union Jack being prominent. The scene appears to be a public demonstration or celebration. The image is framed by a white, hand-drawn style border.

MAHALO
