April 11, 2012

The Honorable Shan Tsutsui, President
and Members of the Senate
Twenty-Sixth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker
and Members of the House
Twenty-Sixth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Tsutsui, Speaker Say and Members of the Legislature:

This is to inform you that on April 11, 2012, the following bill was signed into law:

SB2783 RELATING TO THE PUBLIC TRUST LANDS.
Act 015 (12)

Sincerely,

[Signature]
NEIL ABERCROMBIE
Governor, State of Hawaii
A BILL FOR AN ACT

RELATING TO THE PUBLIC TRUST LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. In 1978, the Constitution of the State of Hawaii was amended to include article XII, sections 4, 5, and 6, which established the office of Hawaiian affairs and its board of trustees.

Sections 4, 5, and 6 of the State Constitution provide:

SECTION 4. 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.

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

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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.

SECTION 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise
control over the Office of Hawaiian Affairs through
its executive officer, the administrator of the Office
of Hawaiian Affairs, who shall be appointed by the
board.

In Trustees of the Office of Hawaiian Affairs v. Yamasaki,
69 Haw. 154, 737 P.2d 446 (1987), the Hawaii Supreme Court
concluded that the issue of what constitutes the portion of the
income and proceeds derived from the public land trust for the
office of Hawaiian affairs pursuant to article XII, section 6 of
the Hawaii Constitution, is a political question for the
legislature to determine.

In response to the Yamasaki decision, the legislature
enacted Act 304, Session Laws of Hawaii 1990, to clarify the
extent and scope of the State's obligation to provide a portion
of the funds derived from the public land trust to the office of
Hawaiian affairs.

On September 12, 2001, the Hawaii Supreme Court ruled in
Office of Hawaiian Affairs v. State of Hawaii, 96 Haw. 388, 31
P.3d 901 (2001), that Act 304 was effectively repealed by its
own terms, so that it was necessary for the legislature to
specify what portion of which funds, from which lands the office
of Hawaiian affairs was to receive under the State Constitution.
In its decision, the Supreme Court affirmed Yamasaki, observing:

[T]he State's obligation to native Hawaiians is firmly established in our constitution. How the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. See Haw. Const. art. XVI, §7 .... ...

... we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS § 10-13.5 and enact legislation that most effectively and responsibly meets those obligations.

Office of Hawaiian Affairs v. State of Hawaii, 96 Haw. at 401, 31 P.3d at 914 (citations omitted)

One of the purposes of this Act is to resolve and extinguish, finally and completely, any and all claims, disputes and controversies the office of Hawaiian affairs, or any other person or entity claiming by, through, or under the office, has asserted or raised, or could otherwise assert or raise, relating to the portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the State
Constitution or any related statute or act, the office of Hawaiian affairs received between November 7, 1978, up to and including June 30, 2012.

Another purpose of this Act is to effectively and responsibly fulfill the constitutional obligation to native Hawaiians under article XII, sections 4 and 6, of the State Constitution between November 7, 1978, up to and including June 30, 2012, by re-examining the amount of money the office of Hawaiian affairs received under article XII, section 6 of the Constitution, determining whether the office received what it should have received as its share of the income and proceeds from public land trust lands between 1978 and 2012, and providing additional resources to the office in the form of fee simple title to certain parcels of land to completely and finally fulfill the State's constitutional obligations relating to the office of Hawaiian affairs' portion of the income and proceeds from the public land trust lands under article XII, sections 4 and 6, of the State Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012.

The legislature recognizes that the governor and the office of Hawaiian affairs have reached an agreement with respect to conveyances of land and all issues relating to the office of...
Hawaiian affairs' portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the Constitution, between November 7, 1978, up to and including June 30, 2012.

The legislature finds that the agreement between the State and the office of Hawaiian affairs represents a joint recommendation as to the policy the legislature should adopt, to satisfy the State's constitutional obligations to native Hawaiians under article XII, sections 4 and 6 of the Constitution for the period between November 7, 1978, up to and including June 30, 2012, relating to the office of Hawaiian affairs' portion of the income and proceeds from the public land trust lands. Conveyance of the fee simple interest to the lands identified for conveyance will allow the State to effectively and responsibly meet said constitutional obligations to native Hawaiians.

This Act, therefore, is an expression of legislative policy, not a settlement or a contract. This legislation is a legislative act without distinction from any other legislative act. As it is neither a settlement nor a contract, it can give rise to no lawsuits or claims other than an action to compel compliance with this Act's terms, nor to any claim that any
future legislation is barred in any way, or leads to liability in any way, because it somehow conflicts with a settlement, settlement agreement, contract, or the provisions of this Act.

SECTION 2. Notwithstanding any other law to the contrary, the fee simple interest to the following parcels of land with the existing improvements thereon (hereinafter "the Properties") (but not including submerged land, accreted land, or any land makai of the shoreline), is conveyed to the office of Hawaiian affairs as grantee, as of July 1, 2012, as is, where is:

(1) Lots 1, 2, 3, 4, 5, 6(portion), and 9 of File Plan 2471 filed at the Bureau of Conveyances, State of Hawaii, on February 23, 2010;

(2) TMK (1) 2-1-15-61; and

(3) TMK (1) 2-1-15-51.

As directed by the attorney general, the appropriate boards, agencies, officers, and employees of the State shall (1) prepare and execute deeds warranting title only, and such other instruments appropriate and necessary to convey fee title and interest to the above-listed parcels with all existing improvements, to the office of Hawaiian affairs, as grantee, and (2) record the deeds and such other instruments within a reasonable period of time after the effective date of this Act, in the land court or bureau of conveyances, as appropriate. The
aforesaid executed deeds and other instruments shall be
delivered to the office by the State no later than ___ days
after they are recorded. As these are conveyances in which the
State and its agencies are the only parties, the tax imposed by
section 247-1, Hawaii Revised Statutes, shall not apply to them.

For purposes of this section and this Act, "as is, where
is" means that the office of Hawaiian affairs is accepting the
Properties in their existing condition as of March 1, 2012, the
close of the office's period for due diligence, without
representations or warranties of any kind or nature. Except as
set forth in the aforesaid deeds, the State makes no warranty or
representation of any kind or nature, either express or implied,
or arising by operation of law, including, but not limited to,
any warranty of quantity, quality, condition, habitability,
reliability, merchantability, workmanlike construction,
suitability or fitness for a particular purpose, about the
parcels of real property described in this section, any building
or other improvement located on those parcels of land, any
environmental contamination or conditions of those parcels of
land, and the soil conditions related to those parcels of land.

The office of Hawaiian affairs has completed all due
diligence investigations of the parcels necessary to satisfy
itself as to the physical, environmental, economic and legal
conditions relating to the parcels of land, and has indicated
that it relied solely on the information it secured from its due
diligence, and not on any information provided by or on behalf
of the State to determine whether it wished to accept and
acquire title to those parcels of land. All claims and
liabilities against the State, if any, which the office of
Hawaiian affairs has, may have had, or may have in the future,
regarding any injury, loss, cost, damage or liability, including
reasonable attorney's fees, concerning the physical,
environmental, soil, economic and legal conditions of the
Properties, are released, waived and extinguished.

The Properties are and shall remain (even after conveyance
to the office) under the jurisdiction and authority of the
Hawaii community development authority, with respect to zoning,
land use conditions and all other matters over which the
authority has jurisdiction and authority to act. If in the
future, the jurisdiction and authority over zoning and land use
conditions over the Properties is transferred to, changed to, or
vested in another department of agency of the State, then the
Properties shall be under the jurisdiction and authority of such
other department or agency.

The conveyances required to be made by this section shall
not and do not include the rights of native tenants, or any of
the State's rights to minerals and metallic mines, including all
geothermal rights, submerged lands, surface or ground water, or
the State's regulatory and ownership rights (if any) over, or to
historic properties, aviation artifacts, burial sites, and
prehistoric and historic remains under chapter 6E, Hawaii
Revised Statutes.

The Properties conveyed shall be and remain subject to all
encumbrances (whether or not of record), the rights of native
tenants, leases, contracts, agreements, permits, easements,
profits, licenses, rights-of-way or other instruments applicable
to any of the Properties effective or on-going on the effective
date of this Act unless they expire or are terminated pursuant
to their respective terms. These rights and encumbrances shall
be set forth in the deeds conveying the Properties to the office
or set forth in a license or similar agreement, a memorandum of
which may be recorded concurrently with the deeds conveying the
Properties to the office. Effective July 1, 2012, every
reference to the present title-holder or the head of the
department or agency in each such instrument, if the title-
holder is a department or an agency, shall be construed as a
reference to the office of Hawaiian affairs or its board of
trustees.
The Properties shall be subject to all laws, except sections 206E-8, 206E-10, 206E-34, Hawaii Revised Statutes, and as otherwise provided in this Act, provided that the Hawaii community development authority may acquire by condemnation, pursuant to chapter 101, Hawaii Revised Statutes, easements, rights-of-way, rights of entry, or other rights of access in favor of lands adjoining the Properties conveyed that are under the control and management of public agencies, provided the office of Hawaiian affairs is paid just compensation for the same. The office of Hawaiian affairs shall administer the Properties in accordance with its duties under the Hawaii Constitution and as provided by law.

The instruments of conveyance executed and recorded pursuant to this Act shall specify that the office of Hawaiian affairs and any successor owner of any of the Properties shall cooperate with the State and its agencies to designate and grant such access rights and easements to the State or its agencies as may be reasonably necessary for the benefit and use of properties owned by the State or its agencies and which are adjacent to one or more of the Properties. Each of the instruments creating such access rights or granting such easements shall provide that the office, or any successor owner of the servient property, shall have the right to reasonably
relocate any such access areas or easements so granted. The

cost of initially identifying such access areas or designating

and granting any such easements shall be paid by the State. The
cost of relocating any such access areas or easements shall be
paid by the office or any such successor owner, as the case may
be. Each of the instruments creating such access rights or
granting such easements also shall provide that the State and
its agencies shall be responsible for only a reasonable share of
the cost of maintaining any such access areas and easement
areas, as the case may be, and that the office, its tenants,
licensees, concessionaires, successors, and assigns shall not be
liable for injuries or damages arising from the use of such
access areas or easement areas and caused by the acts or
omissions of the State, its agencies or employees, or their
invitees.

SECTION 3. The passage of this Act is in full

satisfaction, resolution, and discharge of any and all claims,
disputes, controversies, actions, causes of action, demands,
claims for relief, liability, liabilities, costs, compensations,
injuries, losses, damages or expenses of any kind or nature,
whether known or unknown, contingent or uncertain, patent or
latent, whether at law or in equity, now existing or hereafter
arising, established or inchoate, including any claim or action

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under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, that have been asserted or could have been asserted, or could be asserted in the future against the State by the office of Hawaiian affairs or any other person or entity claiming by, through, or under the office, in any manner arising out of, growing out of, connected with or traceable either directly or indirectly to, concerning or in any way related to any right the office of Hawaiian affairs or any other person or entity claiming by, through, or under the office may have or may have had to the portion of income and proceeds, or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012.

All claims, disputes, controversies, actions, causes of action, demands, claims for relief, liabilities, costs, compensations, injuries, losses, damages or expenses of any kind or nature, whether known or unknown, contingent or uncertain, patent or latent, whether at law or in equity, now existing or hereafter arising, established, or inchoate, including any claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, that
have been asserted or could have been asserted, or could be
asserted in the future against the State by the office or any
other person or entity claiming by, through, or under the
office, in any manner arising out of, growing out of, connected
with or traceable either directly or indirectly to, concerning
or in any way related to, any right the office of Hawaiian
affairs or any other person or entity claiming by, through, or
under the office may have or may have had to the portion of
income and proceeds, or any other tangible right, item, or
benefit related to said income and proceeds, from the public
land trust lands under sections 4 and 6 of article XII of the
Constitution or any related statute or act, between November 7,
1978, up to and including June 30, 2012, are released, waived,
and forever discharged and extinguished.

Each and every claim or suit that is predicated in any way
upon an act or omission that arises out of or is in any way
related to any right the office of Hawaiian affairs, or any
other person or entity claiming by, through or under the office
may have or may have had to the income and proceeds, or any
other tangible right, item, benefit or claim or action under
chapter 661, Hawaii Revised Statutes, or for breach of trust
under chapter 673, Hawaii Revised Statutes, related to said
income and proceeds, from the public land trust lands under
sections 4 and 6 of article XII of the Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012, is forever extinguished and barred and may not be brought by the office, or by any other person or entity claiming by, through, or under the office.

The passage of this Act shall have the effect of res judicata, collateral estoppel, and claim and issue preclusion as to the office of Hawaiian affairs and all persons and entities claiming by, through, or under the office, and all claims, issues and defenses which have been at issue, or which could have been, or could in the future be, at issue, including any claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, whether brought against the State or its departments, agencies, officials, or employees, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever, arising out of or in any way related to any right the office of Hawaiian affairs, or any other person or entity claiming by, through, or under the office, to the portion of income and proceeds, and/or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of
the Constitution or any related statute or act between November 7, 1978, up to and including June 30, 2012.

The office of Hawaiian affairs shall not, cannot, and is forever prohibited and barred, now and in the future, from (1) asserting, arguing, or claiming that the office was entitled to more receipts than it received pursuant to Act 178, Session Laws of Hawaii 2006, or any other duly enacted law establishing the portion of the income and proceeds from the public land trust lands the office of Hawaiian affairs is to receive under sections 4 and 6 of article XII of the Constitution, between November 7, 1978, up to and including June 30, 2012, (2) bringing an action for breach of trust under chapter 673, Hawaii Revised Statutes, to contest or claim a larger portion of the income and proceeds, and/or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution for itself or its beneficiaries, or (3) asserting, arguing, or claiming that section 673-9, Hawaii Revised Statutes, does not bar a suit to contest or make a claim relating to the portion of the income and proceeds from the public land trust lands the office of Hawaiian affairs receives or is to receive under sections 4 and 6 of article XII of the Constitution. The prohibition and bar imposed by the
immediately preceding sentence shall be applicable to any and all money transferred, or in the future to be transferred, to the office of Hawaiian affairs pursuant to Act 178, Session Laws of Hawaii 2006, or any other law enacted to give effect to the provisions of article XII, sections 4 and 6 of the Constitution relating to the office's portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the Constitution, including, but not limited to, receipts from general leases, revocable permits, and licenses for the use of improved and unimproved parcels of public land trust lands, rents and fees for agricultural uses, rents and fees for retail, office, warehouse, medical and other uses of space in state-owned buildings and facilities, receipts from the sale of wood, rock, and other natural resources on public land trust lands, landing, docking and parking fees, rents and fees from the State's in-bond duty free, park, and other concessions, rents, fees, and reimbursements collected at state-operated hospitals and medical facilities, and fees and rents from the State's affordable housing development and rental public housing projects.

SECTION 4. To the extent that the State has made any waiver of sovereign immunity for a suit, claim, cause of action, or right of action regarding the amount of the income and
proceeds the office of Hawaiian affairs is to receive from the
public land trust lands pursuant to article XII, sections 4 and
6 of the Hawaii Constitution, that waiver is withdrawn.

SECTION 5. The State, while not admitting the validity of
any claims, hereby resolves and satisfies all controversies and
claims described in section 3 of this Act by the conveyance of
the Properties described in section 2 of this Act.

SECTION 6. The Properties conveyed by this Act shall be
deemed income and proceeds from the public land trust, as if the
Properties had been paid out of the income and proceeds from the
public land trust pursuant to article XII, section 6 of the
State Constitution.

SECTION 7. Notwithstanding any other law to the contrary,
the State, and the state officials who may have participated in
the preparation of the provisions or the enactment of this Act,
including the office of Hawaiian affairs, each of the members of
its board of trustees, and its staff, shall not be subject to
suit because of their participation, except if an action is
brought to compel compliance with a provision of this Act, in
which case the action shall be brought only against the State or
the office of Hawaiian affairs, or any official necessary to
compel compliance with a provision of this Act.
SECTION 8. If any provision of chapter 673, Hawaii Revised Statutes, is inconsistent with any provision of this Act, then the provisions of this Act shall prevail.

SECTION 9. (a) The provisions of this Act are not severable to the extent that if any provision of either section 2 or section 3 of this Act is held invalid or unenforceable by a final judgment of the Hawaii Supreme Court or the United States Supreme Court that resolves all issues, this Act in its entirety shall be invalid, all interests in the Properties conveyed pursuant to the provisions of section 2 of this Act, shall be conveyed back to their respective grantors by the office of Hawaiian affairs.

(b) There is no waiver of sovereign immunity to bring any suit, claim, cause of action, or right of action to invalidate section 2 or 3 of this Act, or to enjoin their implementation or application, and to the extent any waiver of sovereign immunity for such a suit, claim, cause of action, or right of action exists, that waiver is withdrawn.

(c) Nothing in this Act limits the legislature's exclusive authority to enact laws.
SECTION 10. This Act shall take effect on July 1, 2012.