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CEDED LANDS

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The ceded lands issue is an important matter for the Legislature. The overwhelming majority of state-owned lands are ceded lands, so this issue involves most of the state-owned land base – over a million acres of land. Also, the State is under a duty imposed by the federal government to dispose of ceded lands revenues in five specific ways, including for the benefit of native Hawaiians. Many Hawaiians believe that the State has not lived up to this obligation, which has given rise to repeated legislation and lawsuits but which has still not been satisfied. In the latest lawsuit, the Hawaii Supreme Court handed the obligation for the next step at resolution back to the Legislature. This memo addresses some of the questions regarding ceded lands.

Q1: What are the ceded lands?

A1: The ceded lands are all of the lands that had been designated as Crown lands and Government lands by the Kingdom of Hawaii. After the overthrow, these lands were appropriated by the Republic of Hawaii, which in turn ceded them to the United States via the Newlands Resolution (the 1898 resolution of annexation).

When Hawaii became a state, the United States government retained some of the ceded lands – approximately 400,000 acres – and granted title to the rest of the ceded lands to the State. The State's portion of the ceded lands is placed into the public land trust (see section 5 of the Admission Act). The federal government's share is subject to being returned to the public land trust when the federal government no longer needs those lands.

Q2: What is the total acreage of the ceded land?

A2: The exact total acreage of the ceded lands held by the State is unclear even today. The Department of Land and Natural Resources (DLNR) and the Auditor have tried to inventory all public lands, but due to the enormity of task, this has not been completed. While in the past, some estimates have approached 2 million acres, according to the consultant hired by the auditor, the actual amount may be between 1.2 and 1.4 million acres because some of the parcels have been either double-counted or lumped in with non-ceded lands.

(Not included in this total are the approximately 203,000 acres of ceded lands that were spun off and designated as Hawaiian Home lands in 1921 and which are administered by the Department of Hawaiian Home Lands (DHHL). These DHHL lands are set aside specifically for home, agricultural, or pastoral use by people of 50% or more Hawaiian descent and are no longer included in the general discussion of "ceded lands.")

Q3: Where are the lands located?

A3: There are ceded lands in all four counties.

Q4: Why is it important to identify the ceded lands?

A4: Ceded lands must be identified because their proceeds or revenue is to be used for specific purposes as provided in both the Admission Act and the state constitution. The most controversial of these uses (at least in implementation) is the use to benefit native Hawaiians: the Office of Hawaiian Affairs (OHA) claims it is entitled to twenty percent of the proceeds or revenue and has sued the State to make it live up to this obligation, which the State cannot fully do without an identification and inventory of the lands.

Q5: What are the ceded lands supposed to be used for?

A5: As originally provided in the Newlands Resolution that provided for the annexation of Hawaii in 1898, the revenue or proceeds of the lands were be used, except for the civil, military, or naval purposes of the United States or the use of the local government, "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." These purposes were ratified by the Organic Act in 1900.

Upon admission of Hawaii to the union, however, section 5(f) of the Admission Act provided that the ceded lands are to be held in trust for five purposes: for the support

of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. (The restriction on the definition of "native Hawaiian" means that it applies only to Hawaiians of 50% or more Hawaiian blood.) The language of 5(f) further specifies that the lands and its income shall be used for one or more of the foregoing purposes, and their use for any other purpose is a breach of trust for which suit may be brought by the United States.

This language is somewhat inconsistent: the land is to be held in trust for *five* purposes, but is only required to be used for *one or more* of the purposes. Additional lack of clarity exists as there is no specific allocation of funds between the five purposes.

Perhaps because this section was vague, the public land trust was first used only for education. It was not until after the 1978 Constitutional Convention, which created OHA, that a portion of the revenues from the lands was specifically set aside for native Hawaiians. In 1980, the Legislature made the decision, since there were five purposes, to give the OHA one-fifth, or twenty percent, of "all *funds* derived from the public land trust",[1] to be used for native Hawaiians.

Q6: Why did OHA bring suit in regard to the ceded lands?

A6: OHA was unsatisfied with the State's perceived lack of compliance with its obligation to native Hawaiians and took the State to court in 1983. The case was eventually dismissed because the court found that the language gave the court no manageable standards to determine whether the State had complied or not. In response, in 1990 the legislature enacted Act 304 to specify that OHA shall receive twenty percent of "all *revenue*" (instead of "all *funds*") from the ceded lands.

In 1994, OHA again brought suit against the State, specifying that it was seeking its pro rata share of revenues received by the State based on: (1) Waikiki Duty Free receipts (in connection with the lease of ceded lands at the Honolulu International Airport); (2) Hilo Hospital patient services receipts; (3) receipts from the Hawai`i Housing Authority and the Housing Finance and Development Corporation for projects situated on ceded lands; and (4) interest earned on withheld revenues.

In September 2001, the Hawaii supreme court found that the federal law specifically forbade any further payment for claims related to ceded lands, which conflicted with

[1]Section 10-13.5 (1983).

OHA's demand for payment based on Waikiki Duty Free receipts, as they were based on sales at the airport, which is partly on ceded lands. Since the terms of Act 304 made it void if it conflicted with any federal act, the court voided the Act, which ended the 20% revenue payments to OHA. The court found that it could not determine, without standards set by the legislature, the amount of revenue OHA should receive, due to the lack of judicially discoverable and manageable standards for determining specific revenues.

Q7: Did the court ruling invalidating Act 304 extinguish the State's need to give part of the ceded land revenues to native Hawaiians?

A7: No. The court **did not invalidate** the State's obligation to native Hawaiians. The court merely found a conflict between state and federal law and applied Act 304's own standards to void that Act. The court specifically acknowledged that the State's obligation to native Hawaiians is firmly established in our constitution. The court emphatically stated that it would not hesitate to declare unconstitutional any subsequent state legislation that does not comport with the constitutional mandates that gives native Hawaiians the right to benefit from the ceded lands trust.

Q8: What is the State doing to identify the ceded lands?

A8: The legislature gave the task of identifying the ceded lands to the auditor in 2000. Act 125 (2000) established a mechanism for inventorying and maintaining information about the ceded lands base by appropriating funds to do so to the auditor. The initial appropriation was $250,000, to be matched by OHA. The auditor's consultant estimated that it would cost about $18.5 - $19.1 million to finish the task. In the 2001 session, the legislature adopted Act 165, which extended the lapsing date of the 2000 appropriation and also appropriated an additional $100,000, again to be matched by OHA. In the 2002 session, however, no funds were appropriated for this task, which will apparently remain at a standstill until it is funded again.