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May 30, 2003

The Honorable Les Ihara, Jr.
Senator, Ninth District
Twenty-Second Legislature
State Capitol, Room 217
Honolulu, Hawaii 96813

The Honorable Ezra R. Kanoho
Representative, Fifteenth District
Twenty-Second Legislature
State Capitol, Room 432
Honolulu, Hawaii 96813

Dear Senator Ihara and Representative Kanoho:

Re: Transfer of Ceded Land Receipts to the Office of Hawaiian Affairs Without Legislative Appropriation

This letter responds to your respective requests for an opinion on the legal authority for transferring ceded land receipts to the Office of Hawaiian Affairs ("OHA") without a current, specific legislative appropriation.

BRIEF ANSWER

It is our opinion that the receipts derived from the ceded lands[1] apportioned for native Hawaiians pursuant to Haw. Const. art. XII, § 6 and Haw. Rev. Stat. § 10-13.5 (1985) may be

[1]Throughout this opinion, the term "ceded land" or "ceded lands" refers to the lands described in the Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959) (hereinafter "§ 5(f)") that were transferred to the State of Hawaii by the United States as part of Hawaii's entry into the Union.

transmitted directly to OHA by the agencies that collect them, without legislative appropriation.

Section 5(f) of the Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959), makes an undifferentiated interest in the income and proceeds from the ceded lands available to native Hawaiians, but leaves it to the State's Constitution and statutes to detail how this objective is accomplished. The State Constitution expressly makes native Hawaiians the beneficiaries of the § 5(f) trust lands, see Haw. Const. art. XII, § 4, directs the Legislature to quantify the extent of native Hawaiians' interest in ceded land receipts, see Haw. Const. art. XII, § 6, and makes the elected trustees of OHA, not the Legislature, responsible for determining how the native Hawaiians' portion of ceded land receipts are spent to further § 5(f)'s purpose, see Haw. Const. art. XII, §§ 5 and 6.

Legislative appropriations authorizing the transfer of the native Hawaiians' share of the ceded land receipts to OHA are not needed for three discrete reasons. The Constitution prescribes a process separate and different from the appropriation process in section 5 of article VII of the State Constitution for making ceded land receipts available to native Hawaiians. Second (and alternatively), the native Hawaiians' share of ceded land receipts does not belong to the State, and thus is not "public money." Third (and alternatively), even if the receipts state agencies collect for the use of ceded lands are "public money," the agencies' transfer of the receipts to OHA does not constitute an "expenditure."

DISCUSSION

The Legislature has responded to article XII, section 6's direction and specified that "[t]wenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by [OHA] for the purposes of this chapter," see Haw. Rev. Stat. § 10-13.5 (Supp. 2002)(hereinafter "§ 10-13.5"),[2] but has never prescribed how OHA is to obtain the "funds

[2] Throughout this opinion, every reference to "§ 10-13.5" is a reference to Haw. Rev. Stat. § 10-13.5 (Supp. 2002). The successor versions of Haw. Rev. Stat. § 10-3 (1985) and Haw. Rev. Stat. § 10-13.5 (1985), see Act 304, §§ 3 and 7, 1990 Haw. Sess. Laws 947, 948, 951, respectively, which provided definitions for the terms "public land trust" and "revenue," and revised § 10-13.5 itself, were repealed along with the rest of Act 304 after Congress enacted the Department of Transportation and Related Agencies Appropriations

derived" in order to "expend" them to better the conditions of native Hawaiians.

Except for the two years during which OHA received its pro rata portion of the income and proceeds from the ceded land through two lump sum appropriations made in Act 329, 1997 Haw. Sess. Laws 956, OHA has received its native Hawaiian beneficiaries' share of the receipts for the use of ceded lands directly from the state agencies that collect them without legislative appropriation.

Individual agencies have always accounted for their ceded land receipts separately. Initially, agencies transferred the native Hawaiians' share of ceded land receipts to OHA as they collected them, and without any particular schedule. After Act 304 was enacted, state agencies followed a process devised jointly by OHA and the Office of State Planning ("OSP"),[3] and deposited 80% of the ceded land receipts they collected to the credit of the general fund or a special fund, and accumulated the remaining 20% for native Hawaiians in holding accounts until the end of each fiscal quarter. Within ten days of the end of each quarter, the sum accumulated was transferred by journal voucher directly to OHA, and deposited into OHA's native Hawaiian trust fund, see Haw. Rev. Stat. § 10-13 (Supp. 2002), for expenditure as authorized by the OHA trustees,[4] or disbursement to OHA's investment managers.

Act, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448 (1998), prohibiting the payment of airport revenues to OHA. Section 16 of Act 304 provided that all of its provisions would be repealed as a matter of law, if any state or federal law conflicted with any of its provisions, and the Hawaii Supreme Court declared them repealed in OHA v. State, 96 Haw. 388, 31 P.3d 901 (2001). See Act 304, 1990 Haw. Sess. Laws 947, 953.

[3]Section 10 of Act 304 directed OSP to "develop and assist in the implementation of appropriately revised policies, practices, and procedures . . . to ensure that [OHA] receives its revenue entitlement promptly." See memorandums from OSP Deputy Director Norma Wong to Director of Finance dated May 17, 1994, and from Director of Finance Eugene Imai to Norma Wong and All Department Heads both dated June 20, 1994.

[4]The trustees authorize two categories of expenditures from the native Hawaiian trust fund: trust funds for inclusion with general funds in the legislative or biennium budget appropriated by the Legislature; and trust funds for OHA's trust fund only budget for expenditures authorized by the trustees only.

The quarterly transfers were discontinued by then Governor Benjamin J. Cayetano after the Supreme Court issued its decision in OHA v. State, 96 Haw. 388, 31 P.3d 901 (2001). In January 2003, state agencies were directed by Executive Order No. 03-03 issued by Governor Linda Lingle to resume making quarterly transfers.

Section 5(f) of the Admission Act directs the State to hold and manage the ceded lands and the "income and proceeds" from the ceded lands, as a public trust.[5] It also prescribes that the lands and the receipts from the lands are to be used for five purposes, including "the betterment of the conditions of native Hawaiians." The State is directed to hold and manage the ceded lands and the receipts from the ceded lands "for one or more of the [five] purposes in such a manner as the constitution and laws of [the] State may provide."

The delegates to the 1978 Constitutional Convention added article XII, sections 4, 5, and 6 to the State Constitution to provide further details on how the ceded land receipts were to

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[5]Section 5(f) of the Admission Act provides in full:

> 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 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. 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 brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(Emphases added.)

be used to accomplish § 5(f)'s purposes.[6] Section 4[7] identifies native Hawaiians and the general public as the beneficiaries of the § 5(f) trust.[8] Section 5[9] establishes OHA as a "trust entity" with a board of elected trustees to receive and administer: (1) the native Hawaiians' share of the income and proceeds from the § 5(f) trust; and (2) any other property that might be conveyed to OHA for native Hawaiians in the future.[10]

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[6]Prior to 1978, only a few provisions in Haw. Rev. Stat. ch. 171 specified how the ceded lands, and the receipts from the ceded lands, were to be used. According to the Legislative Auditor, the receipts from the ceded lands were used principally, if not entirely, for the first of § 5(f)'s five purposes (public education). Legislative Auditor, Final Report on the Public Land Trust, Rep. No. 86-17, at 14 (1986).

[7]Section 4 of article XII provides:

> 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.

[8]Standing Comm. Rep. No. 59 of the Committee on Hawaiian Affairs describes the new section 4 as "recit[ing] the trust corpus of Section 5(b) and nam[ing] the two principal beneficiaries established in Section 5(f) of the Admission Act - native Hawaiians . . . and the general public." I Proceedings of the Constitutional Convention of Hawaii of 1978 (hereinafter "I 1978 P."), Standing Comm. Rep. No. 59, 643-44 (1980).

[9]Section 5 of article XII provides:

> 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.

(Emphasis added.)

[10]Section 5 of article XII actually establishes two trusts -- one for native Hawaiians and one for all Hawaiians. The trust referred to throughout this opinion is the native Hawaiian trust that has been funded primarily by the native Hawaiians' share of ceded land receipts transferred to OHA since 1980.

Section 6[11] sets out the powers of OHA's trustees, and implicitly directs the Legislature to quantify the extent of the native Hawaiians' share of ceded land receipts.

The Legislature satisfied its constitutionally delegated responsibility for quantifying the extent of the native Hawaiians' interest in the income and proceeds from the ceded lands by enacting mechanisms for funding OHA in 1979-1980,[12] and again in 1990.[13]

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[11] Section 6 of article XII provides:

> 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.

(Emphases added.)

[12] The initial "funding mechanism" was set out in two parts. As originally enacted by Act 196, 1979 Haw. Sess. Laws, Haw. Rev. Stat. § 10-3(1) (1985) provided:

> The purposes of [OHA] include:
>
> (1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians.

The next year the Legislature completed the initial version of the "funding mechanism" by enacting Haw. Rev. Stat. § 10-13.5 (1985), which "determined" the "pro rata portion of all the funds derived from the public land trust" that OHA was to use for the "betterment of the conditions of native Hawaiians" to be twenty percent: "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." See Act 273, 1980 Haw. Sess. Laws 525.

A. The State Constitution provides a Special Mechanism, Separate from the Legislative Appropriation Process, for making Ceded Land Receipts available to native Hawaiians

Hawaii law does not define the term "appropriation," but it is generally accepted that an appropriation is the setting aside of a specified amount of money for a particular use, and that ordinarily, it is the legislative branch of government that makes appropriations. New England Div. of the Am. Cancer Soc'y v. Comm'n of Admin., 769 N.E.2d 1248, 1256 (Mass. 2002); City of Camden v. Byrne, 411 A.2d 462, 469 (N.J. 1980). See also Wash. Ass'n of Neighborhood Stores v. Wash., __ P.3d ___, 2003 WL 21040164 at 2 (Wash. May 8, 2003) ("the legislative department of the government [has] the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government.")

See also OHA v. State, 96 Haw. at 398-99, 31 P.3d at 398-99, n.16 ("When HRS § 10-13.5 was enacted, it was referred to as a 'funding mechanism,' 'a source of funds,' and an 'appropriation.' [citations omitted.] Moreover, it is clear from the legislative history that the impetus behind enacting HRS § 10-13.5 was to fund OHA so that OHA was not required to seek funding from the legislature every year. [citations omitted.]")

Haw. Rev. Stat. § 10-13 (Supp. 2002) entitled "Appropriations; accounts; reports," first enacted in 1979, also specified that:

> All moneys received by or on behalf of the board shall be deposited with the director of finance and kept separate from moneys in the state treasury; . . . and except that with the concurrence of the director of finance, . . . moneys in trust or revolving funds administered by the office, shall be deposited in depositories other than the state treasury . . . .
>
> Income derived from the sale of goods or services and income from lands and property as described in section 10-3, shall be credited to special or other funds; . . . .

[13]As stated in note 2, supra, the Legislature replaced its original 1980 statute, which was enacted to apportion the native Hawaiians' share of ceded land receipts, by enacting Act 304 in 1990. Act 304 was enacted because the Supreme Court decided in OHA v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987), that the first funding mechanism the Legislature enacted to implement the provisions of § 5(f) and section 6 of article XII of the State Constitution did not provide judicially manageable standards for resolving disputes between OHA and the State as to whether the State had satisfied the requirements of the Admission Act, the State Constitution, or the statutes enacted to implement them.

This fundamental principle is embodied in article VII, section 5 of the State Constitution:

> **EXPENDITURE CONTROLS**
>
> **Section 5.** Provision for the control of the rate of expenditures of appropriated state moneys, and for the reduction of such expenditures under prescribed conditions, shall be made by law.
>
> No public money shall be expended except pursuant to appropriations made by law. General fund expenditures for any fiscal year shall not exceed the State's current general fund revenues and unencumbered cash balances, except when the governor publicly declares the public health, safety or welfare is threatened as provided by law.

(Emphasis added.)

By deliberate design, however, the framers of the State Constitution established a different means of setting aside the native Hawaiians' share of receipts from the ceded lands to effect the Admission Act's purpose of bettering the conditions of native Hawaiians. As has already been noted, section 6 of article XII expressly provides as to the native Hawaiians' portion of ceded land receipts, that "[t]he board of trustees of [OHA] shall exercise power as provided by law: to manage and administer . . . all income and proceeds from that pro rata portion of the [§ 5(f)] trust referred to in section 4." The Constitution limits the Legislature's role to quantifying the extent of the native Hawaiians ceded land interest. Responsibility for "controlling" the native Hawaiians' share and determining how best to use it to better the conditions of native Hawaiians is exclusively that of the trustees of OHA.[14]

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[14]See Haw. Const. art. XII, § 5: "[OHA] 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." See also Committee of the Whole Report No. 13, I 1978 P., at 1018 ("Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people.") It is exceedingly clear that the framers gave OHA these powers so that it could serve as the incubator for Hawaiian self-governance. See Remarks of Committee on Hawaiian Affairs Chairperson

The Hawaii Supreme Court's "well-established rules" for construing the State Constitution include the following principles and maxims.

> The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. This intent is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument. However, if the text is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment.

State ex rel. Anzai v. Honolulu, 99 Haw. 508, 519, 57 P.3d 433, 444 (2002) (quoting State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981)).

> [A] constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

Blair v. Harris, 98 Haw. 176, 179, 45 P.3d 798, 801 (2002) (quoting Hawaii State AFL-CIO v. Yoshina, 84 Haw. 374, 376, 935 P.2d 89, 91 (1997)). The court has also concluded that it "needs no belaboring" that one constitutional provision can qualify the force of another constitutional provision, especially when each provision was added or revised at the same convention. Matayoshi v. Nakano, 68 Haw. 140, 148-49, 706 P.2d 814, 819 (1985).[15] See also In re Attorney Discipline System,

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De Soto, I 1978 P., at 285 ("This proposal attempts to establish a body corporate wherein it would have fiscal responsibilities for the moneys earmarked for native Hawaiians and native Americans, which we are a part of. I think that this proposal attempts, in good faith and honesty, to afford the Hawaiian community a chance for - or at least the opportunity for self-determination").

[15] In Matayoshi, certain Hawaii County employees argued that the ethics financial disclosure requirement that had been added to the State Constitution in 1978, could not apply to them in light of the same delegates' affirmance of the people's "legitimate expectation of privacy where their

967 P.2d 49, 58-59 (Cal. 1998). It is also possible for a court to "look to the 'legislative implementation' of [an] amendment to ascertain the intent of the amendment's framers." Petran v. Allencastre, 91 Haw. 545, 559, 985 P.2d 1112, 1126 (Haw. Ct. App. 1999).

The plain language of article XII, section 6 quoted above demonstrates an intent that OHA have exclusive authority to decide how much of, when, and in what specific way, the native Hawaiians' share of the ceded land receipts is to be used to better the conditions of native Hawaiians. Any suggestion that article VII, section 5 applies instead is clearly contradicted by the 1978 constitutional convention record.

Standing Comm. Rep. No. 59 of the Committee on Hawaiian Affairs reports that OHA was created "to provide a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians." I 1978 P., at 644 (emphases added). The committee was "unanimously and strongly of the opinion that people to whom assets belong should have control over them." Id. It intended that native Hawaiians, through OHA's trustees "determine the priorities which will effectuate the betterment of their condition and welfare."[16]

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personal financial affairs are concerned." 68 Haw. at 148-49, 706 P.2d at 819.

[16]Standing Comm. Rept. No. 59 elaborates:

> Your Committee decided to grant native Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare by granting to the board of trustees powers to "formulate policy relating to affairs of native Hawaiians." Your Committee created the board of trustees of the Office of Hawaiian Affairs in the Constitution to insure that it would handle the assets and financial affairs of native Hawaiians. It is intended that these powers will include the power to contract, to accept gifts, grants and other types of financial assistance and agree to the terms thereof, to hold or accept legal title to any real or personal property and to qualify under federal statutes for advantageous loans or grants, and such other powers as are inherent in an independent corporate body and applicable to the nature and purposes of a trust entity for native peoples. These powers also include the power to accept the transfer of reparations moneys and land.

To guard against the possibility that native Hawaiians' funds, including their share of ceded land receipts, might be used for other purposes, the framers gave OHA a singular independence. The Committee on Hawaiian Affairs noted:

> The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. . . . The status of the Office of Hawaiian Affairs is to be unique and special. The establishment by the Constitution of the Office of Hawaiian Affairs, with power to govern itself through a board of trustees (see Section 6, following), results in the creation of a separate entity independent of the executive branch of government.
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> . . . .
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> . . . Your Committee created the board of trustees of the Office of Hawaiian Affairs in the Constitution to insure that it would handle the assets and financial affairs of native Hawaiians.

I 1978 P., at 645 (emphases added).

Delegate remarks make these objectives clearer:

> DELEGATE SAKIMA: . . . although in the committee report it says this is going to be similar to the University of Hawaii, the university comes under the legislature and this, I've noted, is a very autonomous body. It's almost like another county. So I'm just wondering whether we are not going to have another county formed in the State of Hawaii.
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> DELEGATE KAAPU: Mr. Chairman, in answer to that, I used the analogy of the university only in that it is a body that may hold and receive property, receive gifts, administer programs and conduct its own affairs

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I 1978 P., at 645 (emphasis added).

> under general law, and under the legislature in that case. To that extent it is analogous; beyond that, it is a trust that administers to its own beneficiaries only those resources to which it is already entitled. It may additionally, receive appropriations from the legislature, but under those conditions it would be subject to such provisions as the legislature would make.
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> DELEGATE BARR: . . . .
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> It seems to be clear that it was the intent of the Admission Act that we recognize a special claim, a special interest on the part of an aboriginal people in these Islands. And if that effect sets up a separate county, or a separate trust, or a separate university or whatever, it is well past time that we take that step so that we as people meet the obligation that we have to do justice to that aboriginal people.

II Proceedings of the Constitutional Convention of Hawaii of 1978 ("II 1978 P."), at 459-60 (1980) (emphases added).

The floor speech of Delegate Waihee confirms the framers' intent that the income and proceeds from the ceded lands are to go directly to OHA:

> I just wanted to clarify for those of us -- Delegate Burgess was satisfied with his answer, but to clear the record so the rest of us know what transpired in our little secret caucus here -- what we need to make clear is that this proposal does not transfer to the trust any state lands. What is concerned is that Section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii. Now these categories are generally like agriculture, education and one category in there, one of the five categories (or two, depending how you look at it) is native Hawaiians. So what the trust would do would be to mandate the section of these revenues from public

> lands which are to be give which are presently mandated by the Admission Act to be held in trust for Hawaiians -- would be transferred directly into this new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands.

Id. at 462 (emphasis added).

Haw. Rev. Stat. § 10-13.5 simply states that the native Hawaiians' share "of all funds derived from the [ceded lands] . . . shall be expended by [OHA]." It evidences the Legislature's recognition of OHA's exclusive constitutionally conferred power to determine how the native Hawaiians' share of ceded land receipts is to be used to better their condition, and acknowledges that the Legislature's role is limited to quantifying the native Hawaiians' share only.[17]

Although not essential to the determination of the OHA v. State case, the Supreme Court also observed:

> [W]hen enacted, HRS § 10-13.5 was considered an appropriation. In so "appropriating," the legislature contemplated payment to OHA from the funds actually derived from ceded lands. Indeed, as Congress noted in the Forgiveness Act, the State has, in the past, paid OHA directly from the airport revenue fund.

96 Haw. at 398-99, 31 P.3d at 911-12 (footnote omitted; emphasis added). In the omitted footnote, the Court noted further:

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[17]Section 10-13.5 is also consistent with section 4 of article XVI of the State Constitution which precludes the Legislature from frustrating the trust provisions of both the Admission Act and section 4 of article XII of the State Constitution:

> Compliance with Trust
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> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII . . . .

> When HRS § 10-13.5 was enacted, it was referred to as a "funding mechanism," "a source of funds," and an "appropriation." . . . Moreover, it is clear from the legislative history that the impetus behind enacting HRS § 10-13.5 was to fund OHA so that OHA was not required to seek funding from the legislature every year.

Id. at 398 n.16, 31 P.3d at 911 n.16 (citations omitted; emphasis added).

Article XII, sections 4, 5, and 6 were adopted to effect the Admission Act's purpose of using a portion of the ceded lands' receipts to better the conditions of native Hawaiians. OHA, not the Legislature, is principally and almost exclusively responsible for implementing those provisions. Transferring the native Hawaiians' share of ceded land receipts directly to OHA without subjecting it to article VII, section 5's legislative appropriation is consistent with the plain language of the Constitution and its intent, and clearly permitted, if not necessary.

B. **The native Hawaiians' Share of Ceded Land Receipts is set Aside for Them by the Admission Act and the State Constitution, belong to Them, and is not "Public Money"**

Like the term "appropriation," the terms "public money" and "state funds" are not defined in the State Constitution, or by statute or Hawaii case law. Courts in other jurisdictions have generally concluded, however, that moneys "raised by the operation of some general law and therefore belonging to the state" are "state funds," Kotterman v. Killian, 972 P.2d 606, 617 (Az. 1999), and that moneys in the state treasury are "public moneys," Button v. Day, 127 S.E.2d 122, 128 (Va. 1962).

On the other hand, when a state's constitution establishes a permanent and perpetual fund, earmarks proceeds from particular lands for deposit to that fund, and directs that those funds be used only for specified purposes, the moneys deposited in the perpetual fund are not subject to deposit into the state treasury, and are not state revenues. Button, 127 S.E.2d at 128. Similarly, when "legislation provides in unmistakable terms" that particular moneys are to be remitted to a county once collected, the legislation is not "merely a direction for the internal allocation of funds within the

State's financial structure," and the moneys are not state receipts, even if collected by a state agency. County of Renssalaer v. Regan, 578 N.Y.S.2d 274 (N.Y.A.D. 3 Dept. 1991), aff'd, 607 N.E.2d 793 (N.Y. 1992).

Arizona's Supreme Court has concluded that "[t]he term 'public funds' refers to funds belonging to the state and does not apply to funds for the benefit of contributors for which the state is a mere custodian or conduit." Navajo Tribe v. Ariz. Dep't of Admin., 528 P.2d 623 (Az. 1975) (Arizona constitution's requirement that funds received by state agencies be deposited into the state treasury and appropriated by the legislature did not apply to federal grant money paid to a state agency for disbursement to the Navajo). See also McLead v. Pima County, 849 P.2d 1378 (Az.App.Div. 1 1993) (post-retirement benefit increases for county employees did not have to be appropriated because increases were funded out of plan funds and investment earnings, not state general funds).

It is clear from the State Constitution, as well as state and federal case law, that native Hawaiians, at the least, have an equitable interest as beneficiaries in a portion of the income and proceeds from the ceded lands, and that the share of receipts transferred to OHA belongs to the native Hawaiians. Again, article XII, section 6 provides in pertinent part:

> **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; . . . .

(Emphasis added.)

Again, the Committee on Hawaiian Affairs declared:

> [Section 6] empowers the board to administer and manage the pro rata share of assets derived from the public lands granted to those native Hawaiians . . . under Section 5(f) of the Admission Act.

Standing Comm. Rep. No. 59, I 1978 P., at 646 (1978)(emphasis added).

The Hawaii Supreme Court has confirmed native Hawaiians' right to a portion of the income and proceeds from the ceded lands. Although it was then "left with no judicially manageable standards by which to discern what specific funds OHA [was] entitled to receive," the court concluded in OHA v. State, that "we would do a disservice to all parties involved if we did not acknowledge that the State's obligation to native Hawaiians is firmly established in our constitution," and that "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." 96 Haw. at 401 (emphases added).

The Ninth Circuit Court of Appeals in Price v. Akaka, 928 F.2d 824, 826-27 (9th Cir. 1990) (citations omitted), had earlier noted:

> Section 5(f) of the Admission Act directed unequivocally that the lands conveyed to Hawaii in § 5(b), and the income produced by them, "shall be managed and disposed of for one or more" of five state purposes. Because the OHA share of "public trust" income at issue in this case derives directly from the § 5(b) lands, § 5(f)'s limitation on uses applies to that income.
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> . . . .
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> . . . Transferring a portion of the § 5(f) trust income to a state agency [does] not dissolve or dilute the restrictions on how that income may be spent.

The Admission Act and article XII, section 6 of the State Constitution set aside a portion of the receipts from the ceded lands for native Hawaiians. The portion set aside for native Hawaiians belongs to them. Because that portion of the ceded land receipts does not belong to the State, that portion of the receipts is not public moneys, and is not subject to the appropriation requirement in article VII, section 5 of the State Constitution. Accordingly, that portion of the receipts may be transferred directly to OHA to expend for the Admission Act's purpose, without first being appropriated by the Legislature to OHA for that purpose.

C. Moneys Collected for the Use of Ceded Lands are Receipts, and State Agencies are not Expending them when They Transfer the native Hawaiians' Share of the Money to OHA

Article VII, section 5's appropriation requirement similarly does not apply to the native Hawaiians' share of ceded land receipts state agencies collect and transfer to OHA directly, because the state agencies do not use the ceded lands themselves and are not paying OHA when they make the transfer. They are merely serving as the conduits through which the sums others pay for the use of the ceded lands are conveyed to OHA. A legislative appropriation is not required, because the moneys the agencies transfer to OHA are moneys the agencies receive and not moneys the agencies are spending. The moneys represent receipts, not expenses.

Hawaii's courts have not construed section 5 of article VII, or decided a case in which the term "expend" is used in the same sense as it is used in that provision needed to be defined. Courts of other jurisdictions have concluded, however, that constitutional provisions for limiting expenditures do not apply to "determination[s] of the share of assets" which one government agency is required to turn over to another government agency. La Paz County v. Yuma County, 735 P.2d 772 (Az. 1987). Courts have also ruled that to constitute an "expenditure," the sum in question must represent an "outgo of funds" or, at least, a loss of revenue that the government entity "would otherwise enjoy." Cervase v. Kawaida Towers, Inc., 308 A.2d 47 (N.J.Super. 1973), aff'd 322 A.2d 477 (N.J.Super.A.D. 1974). Transfers of assessments collected by a state agency for deposit into a fund created by the state constitution are not expenditures, even if the assessments are first deposited into the state treasury and then transferred to the constitutionally created fund. Mountain States Legal Found. v. Apache County, 706 P.2d 1246 (Az.App.Div. 1 1985). Moreover, state agencies are neither appropriating nor expending money when they deposit receipts earmarked for a particular fund to the credit of that fund. Gilligan v. Attorney General, 595 N.E.2d 288, 291 (Mass. 1992) ("Although we focused on the fact that an appropriation 'designates a sum of money to be devoted to some object,' we did not redefine the concept of appropriation or suggest that an appropriation occurs in every situation where public monies are designated to be devoted to a specific purpose"). See also Bates v. Dir. of Office of Campaign & Political Fin., 763 N.E.2d

6, 12 (Mass. 2002) ("setting aside money in a fund does not, without more, amount to an 'appropriation'").

The ceded land receipts that state agencies collect and transfer directly to OHA as the native Hawaiians' share are not outlays of agency money. The moneys transferred to OHA do not originate with the transferring agencies, or represent the agencies' payment of rent for their use of ceded lands. The transfers are deposits to the credit of OHA made to implement article XII, section 6's requirements. Because the transfers are not expenditures, article VII, section 5 of the State Constitution does not apply.

CONCLUSION

For the foregoing reasons, we believe that the native Hawaiians' share of the moneys state agencies collect for the use of ceded lands may be transferred directly to OHA to spend to implement the Admission Act by bettering the conditions of native Hawaiians, without a legislative appropriation of any kind.

Very truly yours,

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