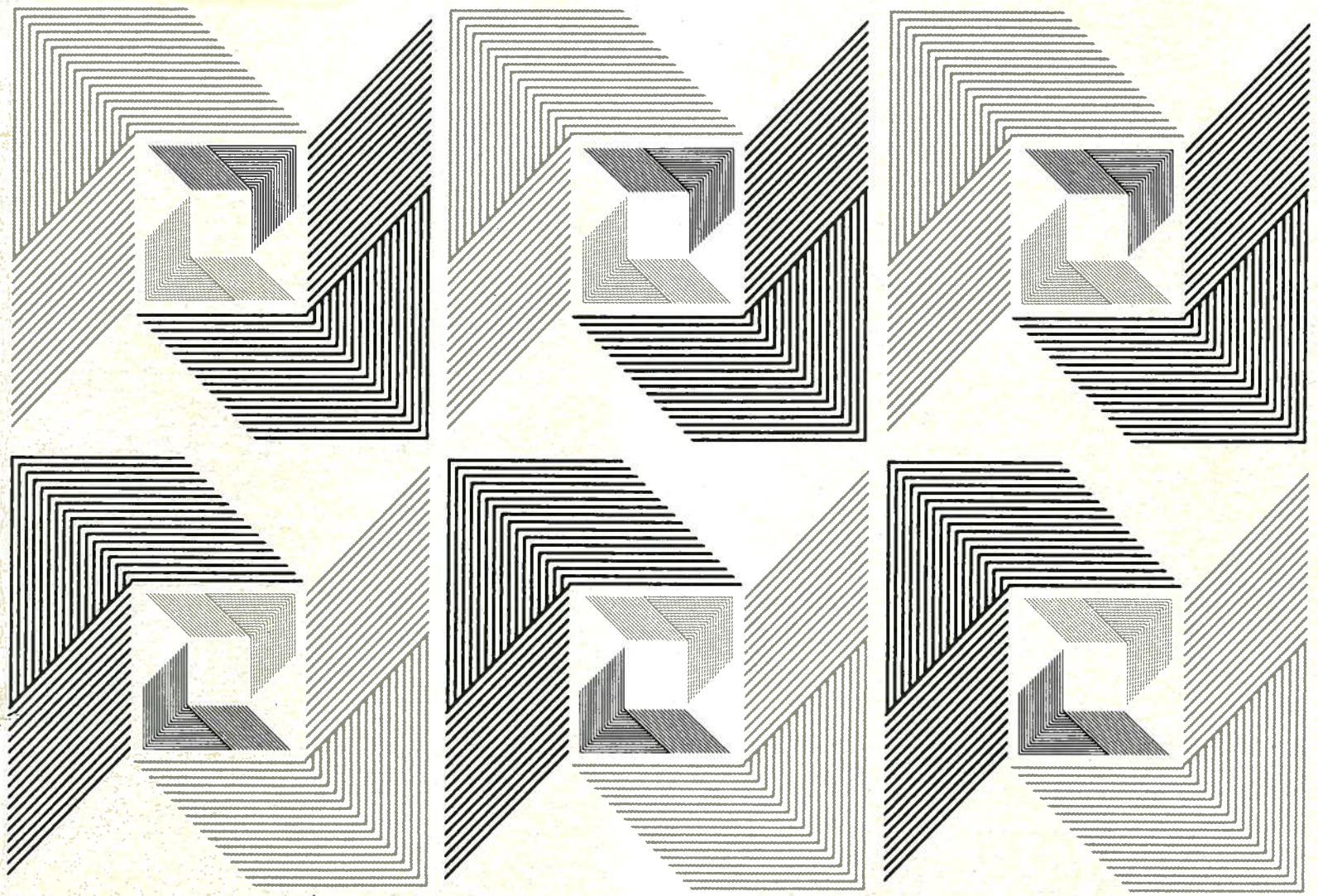
Report No. 86-17
December 1986

FINAL REPORT ON THE PUBLIC LAND TRUST

A REPORT TO THE LEGISLATURE OF THE STATE OF HAWAII



SUBMITTED BY THE LEGISLATIVE AUDITOR OF THE STATE OF HAWAII

THE OFFICE OF THE LEGISLATIVE AUDITOR

The office of the legislative auditor is a public agency attached to the Hawaii State legislature. It is established by Article VII, Section 10, of the Constitution of the State of Hawaii. The expenses of the office are financed through appropriations made by the legislature.

The primary function of this office is to strengthen the legislature's capabilities in making rational decisions with respect to authorizing public programs, setting program levels, and establishing fiscal policies and in conducting an effective review and appraisal of the performance of public agencies.

The office of the legislative auditor endeavors to fulfill this responsibility by carrying on the following activities.

1. Conducting examinations and tests of state agencies' planning, programming, and budgeting processes to determine the quality of these processes and thus the pertinence of the actions requested of the legislature by these agencies.

2. Conducting examinations and tests of state agencies' implementation processes to determine whether the laws, policies, and programs of the State are being carried out in an effective, efficient, and economical manner.

3. Conducting systematic and periodic examinations of all financial statements prepared by and for all state and county agencies to attest to their substantial accuracy and reliability.

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5. Conducting special studies and investigations as may be directed by the legislature.

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FINAL REPORT ON THE PUBLIC LAND TRUST

Conducted by the

Office of the Legislative Auditor

With the assistance of

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A Report to the Legislature of the State of Hawaii

Submitted by the

Legislative Auditor of the State of Hawaii
Honolulu, Hawaii

Report No. 86-17

December 1986

FOREWORD

This report is the *Final Report on the Public Land Trust,* a study which was authorized by Act 121, Session Laws of Hawaii 1982. It supersedes the *Progress Report on the Public Land Trust,* which our office submitted to the Legislature in 1983.

The final report is in two volumes of which this particular volume is of more general interest. It contains our findings and recommendations pertaining to issues related to the public land trust. The other volume, which will receive a limited distribution, contains the chain of titles and land title maps of lands encompassed within the boundaries of certain state airports and harbors.

We were fortunate to have obtained the services of Yukio Naito, an authority on public land policy, to direct and coordinate the study. Mr. Naito, who is an attorney with the law firm of Shim, Tam, Kirimitsu & Naito, has frequently been called upon by the State Legislature for advice on important public issues.

Consultant firms which contributed to the study include Peat, Marwick, Mitchell & Co.; Coopers & Lybrand; and the Consulting Group of Hawaii.

We were also assisted in the study by Nardess Awana, formerly with the abstracting section of the highways division of the State Department of Transportation, who performed all title searches on the airport and harbor lands dealt with in the report. The staff of the cadastral engineering section of the highways division performed the land surveys and land title mapping, and we especially want to acknowledge the assistance of Donald King, former head of the section; Layton Chew, land surveyor; and Dorothy Miyata.

During the course of the study, a number of government agencies and jurisdictions provided needed information and cooperated fully in the study. We acknowledge the assistance of the land management division of the Department of Land and Natural Resources, the commercial harbors and airports divisions of the Department of Transportation, the Hawaii Housing Authority, the University of Hawaii, the Department of Education, the City and County of Honolulu, the County of Hawaii, the County of Kauai, and the County of Maui.

It is our hope that this study contributes to the deliberations on a very important public issue.

Clinton T. Tanimura
Legislative Auditor
State of Hawaii

December 1986

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Chapter 1

INTRODUCTION

Act 121, Session Laws of Hawaii 1982, appropriated funds to the Office of the Legislative Auditor ". . . (1) to complete the inventory of, (2) to study the numerous legal and fiscal issues relating to the use of and (3) to study the use and distribution of revenues from ceded lands."

In March 1983, we submitted a progress report on our performance with respect to the inventory of public lands and on some of the legal issues associated with the use of public lands and distribution of revenues from public lands. We emphasized then that the work assigned by Act 121 was enormous and that it was not possible to complete all of the tasks assigned by the Act within the eight or nine months that were available at that time.

We have now substantially completed the assigned tasks, and this is our final report on our work under Act 121. We have incorporated into this report all of our findings contained in the progress report to the extent that they are still relevant. This final report, therefore, supersedes the progress report, and the progress report should be discarded.

This final report is in two volumes. This volume contains our findings and recommendations. A separate volume contains the chain of titles and land title maps of lands encompassed within the boundaries of the Honolulu International Airport, General Lyman Field, Molokai Airport, Honolulu Harbor, Kahului Harbor, Kewalo Basin, and a portion of the Keehi small boat harbor area. The chain of land

titles and land title maps are the results of title searches and extensive boundary reviews made of the lands and are furnished as appendices to our findings and recommendations.

"Ceded Lands": A Definitional Problem

Act 121 speaks in terms of "ceded lands." Technically speaking, "ceded lands" are lands that were ceded to the United States by the Republic of Hawaii under the joint resolution of Annexation of Hawaii approved July 7, 1898 (30 Stat. 750) and those that have been acquired in exchange for the lands so ceded.

Act 121, however, was enacted in a large measure because of problems in implementing the Hawaii constitutional and statutory provisions concerning the use, for the betterment of native Hawaiians, of the lands in the public trust created by section 5(f) of the Admissions Act (Public Law 86–3, 73 Stat. 4). Act 121, therefore, needs to be read in the context of those constitutional and statutory provisions.

When read in that context, Act 121 requires an examination of not only ceded, but other public lands as well. Although the bulk of the lands in the public trust are ceded lands, the trust also includes other public lands. Further, the Admission Act does not expressly subject all ceded lands to the public trust. Only ceded and non–ceded lands returned to Hawaii by the United States on and after statehood are made subject to the trust. In addition, the problems enumerated in Act 121 impact upon lands in the public domain, whether ceded or not, and whether within or without the public trust.

Our approach, therefore, in performing the work required by Act 121, was to study both ceded and non–ceded lands.

Objectives

Legislative intent in enacting Act 121 was expressed in Senate Standing Committee Report 768-82, 1982 Regular Session, as follows:

> "The purpose of this bill is to assist the State in resolving the many issues relating to ceded lands. This is to be accomplished by completing the ceded land inventory; studying the legal and fiscal issues relating to use of ceded lands; and studying the use and distribution of revenues generated from ceded lands.
>
> "Your Committee finds that the many uncertainties surrounding the matter of ceded lands, and the disposition of revenues generated by the use of ceded lands can best be resolved by ascertaining what and where ceded lands exist, the legal and fiscal problems which may exist or arise from their use, and the effect on all parties concerned with the use and distribution of revenues generated from ceded lands."

We viewed Act 121 as requiring us to achieve the following:

1. Complete the public land inventory with emphasis on the lands included within the public trust established by section 5(f) of the Admission Act.

2. Identify the legal and fiscal issues in the use of the lands and the proceeds and income from the lands in the public trust and determine the implication of these issues.

3. Ascertain the accuracy and propriety of the use and distribution of the proceeds of and income from the public trust.

We have accomplished these objectives to the extent possible, given the time and resources available to us, except that we have not dealt with fiscal issues at any length. The nature and character of the fiscal issues are not readily apparent at this time. Fiscal issues are difficult to identify until what precisely the Office of Hawaiian Affairs (OHA) is entitled to receive under HRS chapter 10 is clarified. We deal extensively in this report with the issue of OHA's entitlement and recommend legislative solution of the issue. Some fiscal matters, such as the adequacy of the basis for lease rentals on trust lands, are better left to a separate financial audit.

Organization of This Report

This report contains seven chapters. Chapter 1 is this introductory chapter. Chapter 2 contains background information on the development of the public land trust contained in section 5(f) of the Admission Act and on the state constitutional and statutory provisions concerning the trust. In chapter 3, we introduce the subject of the state land inventory and generally describe the holdings of the State. In chapter 4, we describe the inventory kept by the Department of Land and Natural Resources, the University of Hawaii, the Hawaii Housing Authority, and the counties. In chapter 5, we present our findings on our in-depth review of a portion of the State's airport lands. In chapter 6, we review the inventory of a part of the State's harbor lands. In chapter 7, we discuss some legal issues pertaining to OHA's entitlement to the proceeds of and income from the lands in the public land trust and make recommendations concerning those issues.

Glossary

As used in this report, the following words have the meaning ascribed to them:

Ceded lands:	lands ceded to the United States by the Republic of Hawaii under joint resolution of annexation approved July 7, 1898.
Territorial lands:	lands acquired by the Territory of Hawaii through cash purchases, condemnation, gifts, etc.
U.S. fee simple lands:	lands acquired by the United States through cash purchases, condemnation, gifts, etc., excluding lands acquired from the Republic or State of Hawaii.
Trust land:	lands subject to the public land trust provided in section 5(f), Admission Act.

Reference to certain statutes are repeatedly made in this report. Whenever chapter 10, section 10–3 and section 10–13.5 are referred to, they mean chapter 10, section 10–3 and section 10–13.5 of the Hawaii Revised Statutes; and whenever section 5(a), section 5(b), section 5(e), and section 5(f) are referred to, they mean section 5(a), section 5(b), section 5(e), and section 5(f) of the Admission Act.

The names of state agencies are often abbreviated in this report as follows:

DHHL:	Department of Hawaiian Home Lands
DLNR:	Department of Land and Natural Resources
DOE:	Department of Education
DOT:	Department of Transportation
HHA:	Hawaii Housing Authority
OHA:	Office of Hawaiian Affairs
UH:	University of Hawaii

Other abbreviations used in this report are:

PL or P.L.:	Public Law
HIA:	Honolulu International Airport

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Chapter 2

BACKGROUND

In this chapter, we trace the history of the public trust created by section 5(f) of the Admission Act, and we discuss the development of the state constitutional and statutory provisions concerning the public land trust. We begin with a brief discussion of the ownership of public lands in Hawaii between annexation and statehood.

Ownership of Public Lands: Annexation to Statehood

On the annexation of Hawaii by the United States in 1898, all lands owned by the Republic of Hawaii were ceded to the United States. At that time, Hawaii's public domain included about 1,800,000 acres.[1]

During the period between annexation and statehood, although the legal title to the public lands in Hawaii was vested in the United States, the Territory of Hawaii was given administrative control and use of the lands by the Organic Act. The Territory of Hawaii, in essence, secured an equitable title to the ceded lands. As allowed by the Organic Act, however, certain parcels were from time to time formally "set aside" by presidential executive orders for use by the United States. As to these lands, the United States possessed both the legal and the equitable title.

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1. R. Horwitz, J. Caesar, J. Finn & L. Vargha, *Public Land Policy in Hawaii: An Historical Analysis,* 59–107 (Legislative Reference Bureau Report No. 5, 1969) [hereafter cited as Public Land Policy].

In addition, some parcels, although not formally "set aside," were nonetheless used by the United States under permits, licenses or permission (oral and written) from the territorial government. Technically, the Territory of Hawaii continued to possess the equitable title to these lands.

The Organic Act also allowed the United States to convey the legal title to the Territory of Hawaii to such portions of the ceded land as might be used by Hawaii for certain specified purposes. Pursuant to this authority, from time to time during the territorial period, the legal title to some of the ceded lands was conveyed by the federal government to the Territory of Hawaii.

In addition to ceded lands, both the Territory of Hawaii and the United States acquired during the territorial period, fee simple title to private lands by cash purchases, condemnations, gifts, and other ways. Some of these lands acquired by the Territory were "set aside" by the Governor of the Territory of Hawaii by executive orders for use by the United States.

At the time of statehood, then, there were the following categories of lands owned by the federal and territorial governments:

1. Ceded lands, title to which was vested in the Territory of Hawaii.

2. Non-ceded, territorial lands (hereafter "territorial lands"), title to which was vested in the Territory of Hawaii.

3. Ceded lands, title to which was vested in the United States, but the control and use were in the Territory of Hawaii.

4. Ceded lands formally "set aside" by presidential executive orders for the use of the federal government.

5. Territorial lands formally "set aside" by gubernatorial executive orders for the use of the federal government.

6. Ceded lands under the control of the Territory of Hawaii but used by the federal government under permits and licenses.

7. Non-ceded lands acquired and used by the federal government (hereafter "U.S. fee simple lands").

Ownership of Public Lands: Under Admission Act

The act admitting Hawaii into the Union redefined the ownership of public lands in Hawaii. Section 5 of the Admission Act in subsections (a), (b), (c), (d), and (e) vested title to the public lands in Hawaii as follows:

1. Under subsection (a), except as provided in subsection (c), the State of Hawaii succeeded to the title of the Territory of Hawaii in those *ceded and territorial* lands in which the Territory held title at the time of Hawaii's admission into the Union.

2. Under subsection (b), except as provided in subsections (c) and (d), the State of Hawaii succeeded to the title of the United States in those *ceded* lands in which the United States held title at the time of statehood.

3. Under subsection (c), the United States retained title to those *ceded and territorial* lands that had been formally "set aside" by presidential and gubernatorial executive orders for the use of the federal government.

4. Under subsection (d), the federal government was given authority to vest in the United States, either by congressional act or presidential executive order made pursuant to law, title to those *ceded* lands controlled by the United States at the time of statehood under permit, license or permission of the Territory of Hawaii. The authority was required to be exercised within five years of statehood.

5. Under subsection (e), within five years of statehood each federal agency having control over any land or property that was retained by the United States pursuant to subsections (c) and (d) was required to report to the President on the continuing need for such land or property, and the President was mandated to convey to the State of Hawaii the land or property if the President deemed it no longer needed by the United States.

The Public Land Trust

In section 5(f), Congress provided that lands granted to the State of Hawaii under subsection (b) and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State of Hawaii under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, should "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 . . ., 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 requirement that lands returned to Hawaii via sections 5(b) and 5(e) be held in trust for the purpose enumerated was a continuation of the trust concept initially embodied in the joint resolution of annexation of July 7, 1898.

By the joint resolution, the United States accepted the ownership of all public, government, or crown lands, but provided that the existing laws of the United States relating to public lands would not apply and that Congress "shall enact special laws for their management and disposition." These provisions of the joint resolution were a recognition on the part of Congress that there were significant differences in the

patterns of land ownership and utilization in Hawaii from those that prevailed elsewhere in the United States when the United States acquired land in those areas.

The joint resolution directed the President of the United States to appoint a five-man commission to make recommendations to Congress for the legislation needed for the management and disposition of public lands in Hawaii. While the details of management were yet to be spelled out in future legislation, the joint resolution in general terms stated that all revenue from or proceeds of the public lands, except those used or occupied for civil, military, or naval purposes of the United States, or assigned for the use of the local government, should be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The special legislation called for by the joint resolution was enacted some two years later in the form of the Hawaii Organic Act. As already noted, the act provided for the possession, use, and control of the ceded lands by the government of the Territory of Hawaii, except those lands taken for the use and purposes of the United States by direction of the President or of the Governor of Hawaii. It also provided for the return to Hawaii of ceded lands taken for the use of the United States and for the actual transfer of title to the Territory in certain cases. In addition, while it made no provision for the sale of any of the ceded land by the United States, the Organic Act provided for sales by the Territory of Hawaii (in behalf of the federal government) and for the retention by the Territory of the proceeds of the sale, lease, or other disposition of any lands. It further required that revenues from lands set aside for federal use but which were leased or rented out by the federal government to private parties be paid into the treasury of the Territory.

These provisions collectively were held by the Attorney General of the United States as creating a "special trust" of the ceded lands, the federal government holding but a naked title to them for the benefit of the people of Hawaii.[2]

The trust provision of section 5(f) of the Admission Act was, thus, a natural extension of the trust concepts embodied in the joint resolution of annexation and the Organic Act.

Public Law 88–233

On August 21, 1964, the five–year statutory period provided in section 5(e) of the Admission Act for the determination and return to Hawaii of ceded and territorial lands no longer needed by the United States expired, and all ceded and territorial lands held by the United States on August 21, 1964, became the property of the United States, subject to the provisions of Public Law 88–233.

Public Law 88–233 was enacted by Congress on December 23, 1963, at the urging of the governmental leaders of the State of Hawaii. Without Public Law 88–233, whenever after August 21, 1964, any ceded or territorial land retained by the United States became surplus to the needs of the federal government, the disposition of such land would have been governed by the provisions of the general law on federal surplus property. Under the general law, with certain limited exceptions, the State of Hawaii would not have been able to obtain title to the property except through purchase at market value.

There appeared to be no reason why ceded or territorial land set aside to or otherwise controlled by the United States should be returnable to the State at no

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2. 22 Op Attorney General 574 (1899).

cost if it were deemed surplus to the needs of the United States *on or before* August 21, 1964, but not returnable to the State at no cost if it were deemed surplus *after* August 21, 1964. All ceded and territorial lands set aside for the use of or otherwise controlled by the United States had initially been given to the United States without cost by the Republic and the Territory of Hawaii; and they had been used and were being used by the United States without compensation to Hawaii. It seemed inequitable that Hawaii should be able to secure a return without cost as to some of these lands but not as to others. Further, to deny Hawaii a free return of the ceded and other lands retained by the United States beyond August 21, 1964, appeared to be contrary to the concept of the special trust status of those lands.

For these reasons, Congress enacted Public Law 88–233. The statute abolished the August 21, 1964 deadline and provided for the return to Hawaii of ceded and territorial lands retained by the United States whenever such lands became surplus to the needs of the federal government. The return is to be without cost to the State, except for payment by the State of the estimated fair market value of any buildings, structures, and other improvements erected on such lands after they were set aside for the use of the federal government.

Public Law 88–233 made all lands returned under it subject to the trust restrictions of section 5(f) of the Admission Act in the same manner as lands returned under sections 5(b) and 5(e) of the Admission Act.

The Hawaii Constitution

Section 5(f) of the Admission Act provides for the management and disposition of the lands, proceeds, and income of the public land trust for one or more of the enumerated purpose "in such manner as the constitution and laws of said State may

provide." However, before 1978, there was little in the state Constitution or state laws implementing section 5(f) of the Admission Act. The only provisions in the Hawaii Constitution (as amended in 1968) that directly related to the section 5(f) trust were article X, section 5, and article XIV, section 8. Neither was particularly illuminating as to the State's emphasis or approach in administering the trust. Article X, section 5, merely reiterated one of the objects of the trust spelled out in section 5(f) of the Admission Act:

> "The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law."

Article XIV, section 8, simply declared:

> "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."

The only statute on the public trust was HRS section 171–18, which reiterated the requirements of section 5(f) of the Admission Act.

In the absence of a more definitive direction, either in the state Constitution or state statutes, the practice of the State of Hawaii before 1978 was to channel the proceeds and income of the lands included in the trust by and large to the Department of Education. The support of the public schools is a legitimate object for which the proceeds and income of the trust lands may be used.

The 1978 constitutional convention adopted amendments to the state Constitution that materially altered the perspective of the State in administering the trust imposed by section 5(f) of the Admission Act.

The convention expanded article XII (previously article XI) by adding sections 4, 5, and 6. (The former article XI had dealt solely with Hawaiian home lands.) Section 4 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."

Section 5 establishes the Office of Hawaiian Affairs. It provides that the office shall hold title to all real and personal property set aside or conveyed to it "which shall be held in trust for native Hawaiians and Hawaiians." Section 5 further provides for the election of a board of trustees for the Office of Hawaiian Affairs.

Section 6 provides, among other things, for the management and administration by the board of trustees of 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."

In an apparent effort to emphasize the new orientation of the public land trust, the convention proposed at least two further amendments to the state Constitution. First, it proposed the deletion of former article X, section 5 (present article XI, section 10), providing for the use of public lands "for the development of a farm and home ownership on as widespread basis as possible." This proposal received the constitutionally required margin of votes of the electorate, but the Hawaii Supreme Court ruled that it was not validly ratified because of procedural defects in its submission to the voters.[3]

The other proposal concerned former article XIV, section 8 (present article XVI, section 7). This section provided for compliance by appropriate

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3. *Kahalekai v. Doi,* 60 H. 324 (1979).

legislation with any public land trust provisions that Congress might impose on the admission of Hawaii into the Union. The convention proposed adding a new sentence to the section, reading, "Such legislation shall not diminish or limit the benefits of native Hawaiians under section 4 of Article XII." Although this proposal, too, received the constitutionally required margin of votes of the electorate, there is some doubt as to whether it was validly ratified for there appears to have been the same procedural difficulties in the submission of this proposal to the electorate as in the case of the proposed deletion of former article X, section 5.

The invalidity of any or both of the two proposals above has not in any way diminished the intent of the convention to provide specifically for the benefit of native Hawaiians out of the public land trust required by the Admission Act. The Constitution, as amended, however, is vague as to the extent to which native Hawaiians are to benefit from the trust. Article XII, section 6 refers to a "pro rata portion of the trust" as being subject to administration and management by OHA. The meaning of "pro rata portion" cannot be gleaned from a reading of the constitutional provisions.

HRS Chapter 10

The legislature in 1979 fleshed out the newly adopted constitutional provisions. It enacted Act 196 which detailed the powers, authority, and responsibilities of OHA. The legislature, however, did not attempt in Act 196 to clarify the degree to which the public land trust should be administered for the benefit of native Hawaiians. That task was left to 1980 when it enacted Act 273. By Act 273, the legislature provided that 20 per cent of all funds derived from the public land trust shall be expended by OHA (HRS section 10–13.5).

Chapter 3

INVENTORY: AN INTRODUCTION

For many years, the State of Hawaii lacked an inventory of public lands from which one could ascertain what specific parcels of land are subject to the public land trust provided in section 5(f) of the Admission Act and to the state constitutional and statutory provisions relating to the trust.[1] In recent years, the governmental agencies responsible for accounting for public lands have made varying efforts to compile and maintain such an inventory. In chapters 4, 5, and 6 of this report we examine these agency efforts. We review the quality and completeness of the agency inventory and discuss the problems associated with their efforts.

General Review

The Department of Land and Natural Resources (DLNR) is accountable for most of the public lands. It accounts for not only the lands it directly controls and manages but also lands controlled and managed by all other state agencies except the University of Hawaii (UH) and the Hawaii Housing Authority (HHA). The UH and the HHA separately account for the lands they use by virtue of the state

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1. We noted the absence of such an inventory in our report, *Financial Audit of the Department of Land and Natural Resources,* Audit Report No. 79-1, January 1979.

Constitution, in the case of the UH,[2] and a state statute, in the case of the HHA.[3] The Constitution and the statute empower these agencies to hold title to real property. Each of the counties is also separately accountable for the public lands under its jurisdiction. In chapter 4, we review the status of the public land inventory compiled by the DLNR, the UH, the HHA, and the counties.

The Department of Education (DOE) utilizes both state and county lands. The state lands used by the DOE are included in the DLNR inventory, but the county lands are not adequately accounted for in the county inventory. Because of this, we also subjected to our examination the inventory maintained by the DOE. Our findings are included in chapter 4.

Special Examination: Airports and Harbors

The State's airports and harbors generate a considerable amount of income annually. They sit in part on lands subject to the trust of section 5(f) of the Admission Act. However, substantial questions have been raised as to the applicability of the public trust provisions of the Admission Act, as well as the applicability of the public trust provisions of the state Constitution and the state statute, to the income from and proceeds of the airports and harbors. We thus subjected a part of the State's airport and harbor lands to an extensive examination to determine the accuracy with which the lands are listed in the state inventory.

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2. Section 5 of the state Constitution provides that the University of Hawaii ". . . shall have title to all real and personal property now or hereafter set aside or conveyed to it. . . ."

3. HRS chapter 356 establishes the Hawaii Housing Authority as a public corporation and empowers it to acquire by purchase or by eminent domain, any real property for any housing project.

The lands selected for review include those at the Honolulu International Airport, General Lyman Field, Molokai Airport, Honolulu Harbor, Kahului Harbor, Kewalo Basin, and a portion of Keehi Lagoon. The results of that examination are contained in chapters 5 and 6.

Limited time and resources did not permit an extensive examination of all airport and harbor lands. An in-depth examination of other airport and harbor lands, although desirable is not essential at this time. The lands, selected for review are the ones of most importance to the State and OHA. The lands at the Honolulu International Airport, Honolulu Harbor, and Kewalo Basin generate most of the airport and harbor revenues. The lands at the General Lyman Field and Molokai Airport include Hawaiian home lands. The Kahului Harbor lands are interesting in that only a small part appears to be trust lands.

Our examination of the selected airports and harbors included an extensive search of title. The title search was performed by an independent title researcher, formerly employed at the state Department of Transportation. The examination also included boundary surveys conducted by the cadastral engineering section of the highways division of the state Department of Transportation. In the case of the Honolulu International Airport, the boundary survey included field surveys, as appropriate. In all other cases, the boundary survey consisted of examining initial and intervening available maps of the areas, visual observations, and reconciling data as revealed by the title searches. Although no actual field surveys were conducted in all cases, the results are believed reasonably to reflect the configuration of the lands at the examined airports and harbors.

Chain of title reports were prepared from the title searches. These reports and the maps that were developed from the boundary surveys are in a separate,

companion volume entitled, "Appendices to the Final Report on the Public Land Trust." Whenever this report refers to an appendix or map, the reference is to the appendix or map in the companion volume.

Special Examination: Sand Island

Sand Island, like the airports and harbors, is included in the inventory of state lands maintained by the DLNR. We gave Sand Island some special attention to determine the accuracy with which the lands there are listed on the state inventory. We did so because Sand Island also generates annually sizeable revenues.

Unlike the airports and harbors, we did not find it necessary to have field surveys done or to make an exhaustive search of title. It is generally conceded by all parties that Sand Island encompasses about 507 acres of land, plus surrounding submerged lands. The issue with Sand Island is whether the lands there have been properly classified as trust and non-trust lands. Our findings on Sand Island are included in chapter 4.

Land Classification System

In our special examination of the airport and harbor lands and of Sand Island, and for the purposes of this report generally, we adopted, with one addition, the DLNR's classification of public lands. The classification is based on the source of Hawaii's title to its public lands. It is as follows:

5(a)	Title acquired under section 5(a), Admission Act
5(b)	Title acquired under section 5(b), Admission Act
5(e)	Title acquired under section 5(e), Admission Act
P.L. 88-233	Title acquired under Public Law 88-233
X	Title acquired by purchase from private parties after statehood

To the foregoing, we have added the class, "other." Included within this class are those public lands which do not fit into any of the above classes. It includes, for example, lands acquired from the United States which the United States had acquired from private sources (i.e., U.S. fee simple lands).

From its classification, one should be able to discern the trust or non-trust status of any parcel of public land and its potential inclusion within the provisions of HRS chapter 10. Lands, title to which vested in Hawaii through sections 5(b) or 5(e) of the Admission Act or through Public Law 88-233 are subject to the trust and possibly to chapter 10. Lands, title to which came to Hawaii through section 5(a) of the Admission Act or through private parties, are not subject to the trust or to chapter 10, whether or not such lands are ceded lands.

Federal versus State Holdings of Public Lands

Before turning to our findings, we think it appropriate to describe briefly the relative holdings of the State and of the federal government of Hawaii's public lands at statehood and after statehood. As already stated, on annexation approximately 1,800,000 acres of Hawaii's public domain were ceded to the United States. Subsequently, however, under the Organic Act, the Territory of Hawaii obtained the possession, beneficial use, and control of most of these lands. From time to time it also acquired from the United States the legal title to some of these ceded lands. Certain portions of the ceded lands were set aside by presidential executive orders for the use of the United States, and other portions, although not officially set aside, nevertheless came under the control of the United States pursuant to permits, licenses, and permission of the territorial government. In addition to the ceded

lands, both the United States and the Territory of Hawaii secured title to other lands by cash purchases, condemnation, gifts, and other ways. Some of the lands so acquired by the Territory of Hawaii were set aside by executive orders of the Governor of Hawaii for use by the United States.

At statehood. Subject to certain exceptions, on statehood (August 21, 1959), the State of Hawaii succeeded to the title of the Territory of Hawaii in the ceded and territorial lands owned by the territory, and to the title of the United States in the ceded lands owned by the United States. The exceptions were: (1) ceded lands that had been set aside by presidential executive orders for the use of the United States; (2) territorial lands that had been set aside by executive orders of the Governor of Hawaii for the use of the United States; and (3) ceded lands controlled by the United States pursuant to permits, licenses, and permission of the Territory of Hawaii. On statehood, these excepted lands totaled 404,491.18 acres as follows:[4]

(1)	Ceded lands set aside by presidential executive orders	287,078.44 acres
(2)	Territorial lands set aside by gubernatorial executive orders	
(3)	Ceded lands under control of the United States pursuant to permits, licenses, or permission of the Territory of Hawaii	117,412.74 acres
TOTAL		404,491.18 acres

As of August 21, 1964. The Admission Act required the federal agencies having control of any of the lands listed above to review their continuing need for

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4. Public Land Policy, 68. The total 404,491.18 acres is exclusive of Sand Island and United States fee simple property.

the lands and directed the President to convey to Hawaii any such lands he deemed no longer needed by the United States. Such determination and conveyance of land in excess of the needs of the United States were required to be made within five years of statehood. Within the statutorily mandated five-year period, the United States conveyed to the State of Hawaii 30,771.59 acres, as follows:[5]

(1)	Ceded lands set aside by presidential executive orders)	
	)	595.41 acres
(2)	Territorial lands set aside by gubernatorial executive orders)	
(3)	Ceded lands under control of the United States pursuant to permits, licenses, or permission of the Territory of Hawaii	30,176.18 acres
TOTAL		30,771.59 acres

The conveyance to the State of the 30,176.18 acres of ceded lands under permits, licenses, or permission of the Territory of Hawaii was the result of negotiations between the State of Hawaii and the United States. The United States defense department was extremely reluctant to give up any of the lands it held under permits and licenses. Under the agreement negotiated, the United States secured 65-year leases to the 30,176.18 acres immediately upon their conveyance to Hawaii, for a nominal charge of $1 per lease. The leases expire in 2029. Also under the agreement, 87,236 acres of ceded lands that had been under the control of the United States pursuant to permits, licenses, and permission of the Territory of Hawaii were "set aside" for the use of the United States.

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5. Public Land Policy, 70-71 (Table 8); 73-75.

As a result of the foregoing conveyances, on August 21, 1964, the federal government owned the following:

(1)	Ceded lands set aside by presidential executive orders	286,483.03 acres
(2)	Territorial lands set aside by gubernatorial executive orders	
(3)	Ceded lands under control of the United States pursuant to permits, licenses, or permission of the Territory of Hawaii	87,236.55 acres
TOTAL		373,697.58 acres[6]

Of the total 286,483.03 acres of ceded and territorial lands "set aside" for the use of the federal government, 227,972.62 acres constituted national park lands and 58,510.41 acres were other ceded and territorial lands.[7]

On August 21, 1964, the distinction between "set aside" lands and lands controlled by the United States under permits, licenses, and permission of the Territory of Hawaii became irrelevant. The five-year statutory period for returning to Hawaii ceded and territorial lands no longer needed by the United States having expired, all lands held by the United States on August 21, 1964, became the property of the United States, subject to the provisions of Public Law 88-233.

By Public Law 88-233, the 227,972.62 acres of ceded and territorial lands in national parks became the fee simple property of the United States government, and the remaining 58,510 acres of "set aside" ceded and territorial lands and the

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6. Exclusive of Sand Island and U.S. fee simple property.

7. Public Land Policy, 68, 72.

87,237 acres of ceded lands under permits and licenses were combined in a new category of "set aside" lands (145,746.97 acres total).

As of today. It is not entirely clear as to how much of the ceded and territorial lands are still owned by the United States, subject to return under Public Law 88-233. Some of these lands were returned to Hawaii since August 21, 1964. It is clear, however, that the State of Hawaii has become vested in more than 1.4 million acres of ceded and territorial lands between August 21, 1959 and August 21, 1964.

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Chapter 4

INVENTORY: GENERALLY

In this chapter we discuss our findings concerning the inventory of public lands maintained by the Department of Land and Natural Resources, the University of Hawaii, the Hawaii Housing Authority, the Department of Education and the counties. We also include here the results of our special examination of Sand Island.

Inventory: DLNR

As stated earlier, the Department of Land and Natural Resources is responsible for accounting for all public lands used by or under the management and control of all state agencies, except the University of Hawaii and the Hawaii Housing Authority.

For many years there was no inventory of public lands. However, in September 1981, the DLNR, through its Division of Land Management, completed an inventory of all state-owned public lands for which the department is accountable. The inventory lists approximately 1,271,652 acres. For the reasons stated earlier, the inventory does not include public lands under the control and use of the UH and the HHA. Also excluded from the inventory are all lands defined as "available lands" by the Hawaiian Homes Commission Act, except those encumbered by a lease to a state agency. In addition, state highways and roads are excluded.[1]

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1. Lands used for state highways and roads are excluded from the inventory because the lands have no tax map key numbers and title to many roads is unclear.

Of the 1,271,652 acres, approximately 1,254,776 acres are managed and controlled by the DLNR. About 14,656 acres are set aside to the Department of Transportation (DOT) for airport and harbor purposes, and about 2,240 acres are used by the DOE for school and library purposes.

The inventory is in two volumes. Volume I includes encumbered public lands. Volume II lists unencumbered public lands.

A parcel is "encumbered" when it is covered by some specific written instrument dealing with its use, i.e., Governor's executive order, general lease, revocable permit, Governor's executive order for forest reserves, and Governor's proclamation for forest reserves. Unencumbered lands include conservation lands; lands without access; lands zoned urban, rural, and agriculture with access; and rivers, beaches, and coastal lands. Table 4.1 shows a break-out of the 1,271,652 acres by these groupings. As noted, 88.4 per cent of the lands are encumbered and 11.6 per cent are unencumbered.

For both encumbered and unencumbered lands, the inventory lists the parcels by counties. Within each county, the parcels are listed in a chronological order by tax map key numbers. The inventory notes for each parcel, the number of acres; the state land use classification (urban, rural, agricultural, conservation) and the HRS section 171-10 public land classification (intensive agriculture, pasture, residential, industrial, etc.), as appropriate; a brief description of the parcel; and the source of Hawaii's title to the parcel. With respect to the last of these items, the appropriate subsection of section 5 of the Admission Act is noted as applicable. That is to say, if Hawaii acquired title to the parcel via section 5(a) of the Admission Act, the symbol "A" or "5A" is noted for the parcel; if acquired via section 5(b) of the Admission Act, the symbol "B" or "5B" is noted; and so on. Pertinent survey maps

and land office deeds upon which reliance was had in developing the inventory are also noted.

Table 4.1

State Public Land Inventory
September 1981

	Number of Acres		Per Cent
ENCUMBERED LAND			
Governor's Executive Orders	46,956		
General leases	251,204		
Revocable permits	76,271		
Governor's Executive Orders for Forest Reserves	173,826		
Governor's Proclamations for Forest Reserves	575,636		
Total--Encumbered Land		1,123,893	88.4
UNENCUMBERED LAND			
Conservation	42,703		
Land With No Access	32,643		
Urban, Rural, and Agricultural Land With Access	48,229		
Rivers, Beaches, and Coastal Land	24,184		
Total--Unencumbered Land		147,759	11.6
TOTAL ENCUMBERED AND UNENCUMBERED STATE-OWNED PUBLIC LAND		1,271,652	100.0

For encumbered lands, in addition to the above the inventory identifies for each parcel, the pertinent executive order, lease document, etc., and lists the name or names of the occupants or users of the parcel. Where a lease or revocable permit is involved, the inventory also notes the amount of the annual rental being charged at the time the inventory was put together.

Development of the inventory. The DLNR commenced development of the inventory in April 1979. It began the task by assembling available and pertinent tax maps, survey maps, and various land documents (i.e., deeds, Governor's executive orders and proclamations, lease and permit documents, etc.). A 1979 computer

listing of encumbered and unencumbered state-owned acreages from the Department of Taxation's real property division was of material assistance.[2]

At the outset, the effort was devoted simply to listing all public lands by tax map key numbers, and to note for each parcel, the acreage, the zoning, and if encumbered, the encumbrances, the effective date of the encumbrance and the annual rent, if applicable. However, in June 1980, Act 273, SLH 1980, which mandated the payment to OHA of 20 per cent of certain trust fund revenues from lands conveyed to Hawaii under sections 5(b) and 5(e) of the Admission Act took effect. That law necessitated a reorientation in the department's efforts in developing the inventory. It became necessary for the department to identify what lands were conveyed to Hawaii under sections 5(b) and 5(e) of the Admission Act.

Work toward completion of the inventory came to a temporary halt in June 1980 as the Division of Land Management devoted six months researching the title histories of and the sources of the State of Hawaii's title to the encumbered lands, with particular attention being given to lands encumbered by general leases and revocable permits.

Title histories of the parcels were determined primarily through survey maps and documents previously prepared for other purposes by the survey division of the Department of Accounting and General Services and through land transfer documents, including presidential executive orders, kept in the files of the DLNR. These documents and deeds were consulted for the legal authority cited for the transfer to Hawaii and the history of conveyances of the lands. Where a title

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2. A 1978 amendment to article VII, section 3 of the state Constitution transferred the functions, powers, and duties relating to real property taxes from the State to the counties. The transfer took effect on July 1, 1981.

history of a particular parcel was missing, the title history of the surrounding property was examined to assist in determining the history of the land in question. The Confirmation Act of 1848[3] which separately listed the lands then owned by the Crown and those owned by the government, and other land laws of the past were reviewed to determine whether a particular land was ceded land or not.

As a result of the research, examination, and review, encumbered lands were segregated into ceded and non-ceded lands, and the legal bases for the acquisition of title in the State of Hawaii as to each parcel was determined. Table 4.2 outlines the classification system used by the DLNR. Initially, the DLNR listed submerged lands as a separate category 5(i), non-ceded lands. This designation was subsequently changed when in 1982, the state Attorney General ruled that all submerged lands are ceded lands. Submerged lands have since been classified by the department as ceded, 5(b) lands.

Some parcels listed by the department as ceded or non-ceded consist of both ceded and non-ceded lands. In these cases, the department applied the "majority rule," that is to say, a parcel was classified as ceded if it contained more ceded than non-ceded lands and it was classified as non-ceded if it contained more non-ceded than ceded lands. According to the Division of Land Management, the application of this majority rule was limited to some 30 parcels. The division, however, has not maintained a listing of these parcels.

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3. The Confirmation Act confirmed land title awarded to private individuals by the Land Commission. Title to lands were awarded as a part of the Great Mahele. The Confirmation Act also served to delineate those lands declared by King Kamehameha III as belonging to the Crown and those belonging to the Hawaiian government. Both crown and government lands were ceded to the United States upon annexation.

Table 4.2

Ceded and Non-Ceded Classifications by Land Description and Category

Land Description	Category
CEDED LAND	
. Lands acquired by the Territory from the U.S. after 1900, but prior to Statehood	5(a)
. Lands acquired at Statehood from the federal government	5(b)
. Lands retained under 5(c) or 5(d) of the Admission Act and conveyed under 5(e)	5(e)
. Lands conveyed to the State after 1964 pursuant to P.L. 88-233	P.L. 88-233
NON-CEDED LAND	
. Lands acquired by the Territory from private individuals after 1900, but prior to Statehood	5(a)
. Lands purchased by the State from private individuals after 1959	(X)

In order to ascertain the reasonableness of the application of the majority rule, we sought to identify the parcels on which the rule was applied. With the assistance of the Division of Land Management, we identified seven parcels. Of the seven, five were encumbered by general leases, and two by revocable permits. An examination of these parcels revealed that in all cases, the rule had been consistently applied.

Table 4.3 shows the application of the majority rule on the seven parcels. As shown, some 11.645 acres of non-ceded lands were treated as ceded, and 1.605 acres of ceded lands (parcels 1 and 2) were treated as non-ceded.

Table 4.3

Application of Majority Rule

Parcel Number	Categories Ceded (Acres) 5(b)	5(e)	P.L. 88-233	Non-Ceded (Acres) 5(a)	(X)	DLM Assigned Category	Annual Rent	Amount to OHA
1	.605	-	-	.835	-	5(a)	$ 100.00	$ -
2	1.000	-	-	4.350	-	5(a)	3,500.00	-
3	.551	-	-	.085	-	5(b)	334.00	66.80
4	9,144.000	-	-	10.000	-	5(b)	4,500.00	900.00
5	4.080	-	-	-	.560	5(b)	1,100.00	220.00
6	4.220	-	-	1.000	-	5(b)	120.00	24.00
7	-	2.267	1.637	-	-	5(e)	300.00	60.00
TOTAL	9,160.766	2.267	1.637	16.270	.560		$9,954.00	$1,270.80

The problems with the inventory. The inventory put together by the DLNR is as precise and complete as can be expected given the circumstances under which it was prepared. The DLNR is the first to admit, however, that the inventory contains inaccuracies. The inaccuracies are in the classification of land as ceded or non-ceded and as trust land or non-trust land and in the acreages of parcels.

The inventory is inaccurate because in developing it, the DLNR relied heavily on secondary data sources of questionable accuracy. It relied, for instance, on existing survey maps and documents which had previously been prepared by the survey division of the Department of Accounting and General Services for sundry purposes. These survey maps and the land documents were, for the most part, themselves based on available documents and other secondary data sources of questionable accuracy. The DLNR also relied on outdated tax maps and executive orders. It further relied on land transfer documents, which in some instances sought to convey property to which the grantor possessed no title or which the grantor had already, previously, conveyed to the grantee. Moreover, the various sources of

information often contained but vague land descriptions. The Confirmation Act, for example, which was consulted for the purpose of determining what lands were ceded and what lands were not ceded to the United States, identifies lands by Hawaiian names given to areas and by geographical features, such as streams, rivers, and mountains.

The DLNR through its Division of Land Management is currently attempting to correct some of the more obvious errors in the inventory. For example, it is clear that the account of the forest reserve acreage is not correct. It seems that some areas were counted more than once. This has occurred because, as noted above, land documents upon which reliance was had in preparing the inventory often conveyed lands more than once. The department is also re-examining those parcels where it applied the "majority rule" in designating the parcels as ceded or non-ceded. It is attempting to differentiate the ceded from the non-ceded portions of the parcels.

We think the DLNR, through its Division of Land Management, is doing the best it can with the resources at its disposal. For a completely accurate and comprehensive inventory, surveys and title searches are required. However, surveys and title searches are expensive to conduct. We do not believe that a completely accurate and full inventory is necessary at this time for all of the public lands. We do think, however, that accuracy and completeness with respect to some public lands are desirable. A reasonably accurate and complete inventory should be made of lands that generate considerable revenues or whose land title history is complex or obscure. It is for this reason that we subjected some of the state airport and harbor lands to an intensive examination.

Operational difficulties. The DLNR has had difficulty keeping the inventory of state lands up to date. A part of the problem in the past was that the inventory was not entirely on computers. A great deal of the work to maintain the inventory had to be done manually. At this writing, considerable progress has been made to computerize the inventory. A program has been written by the electronic data processing division of the Department of Budget and Finance. The inventory is now on the State's computer system. Under this system, the DLNR's Division of Land Management is able to make changes in the computerized inventory on a weekly basis and to issue updated summary reports on a monthly basis for lands on Oahu and on bi-monthly basis for lands on the neighbor islands. The summary reports include a summary of lands encumbered by general leases and permits, a summary of lands encumbered by Governor's executive orders and proclamations, and a listing of lands leased or controlled by the State.

The ability to make changes in the inventory on a weekly basis is a vast improvement over the practice in the past. However, if the Division of Land Management is to make timely changes to its inventory and have ready access to such things as number of leases and permits by Admission Act sections, number of income-producing acres by Admission Act sections, etc., then it needs not just weekly, but daily access to the computer. Without daily access, the manual maintenance of the inventory is not completely eliminated. In fact, an additional manual step is necessary. The Division of Land Management personnel is required manually to log all corrections in the inventory books as changes become necessary. Then, weekly, the necessary input forms need to be completed for the electronic data processing division to make the changes on the computer.

In addition to on-line access to the State's computer system, the Division of Land Management requires additional resources, if an accurate and complete inventory of public lands is to be developed and maintained. Currently, the inventory is the responsibility of a single employee. Often, he is diverted to other tasks. Access to title searches, land surveyors, and persons with legal training to interpret land conveyances would materially aid in the development and maintenance of a comprehensive and reliable inventory of state lands.

Recommendations. We recommend:

1. *The Division of Land Management be provided with on-line access to the State's computer system for its inventory of public lands.*

2. *Additional resources be provided the Division of Land Management in the development and maintenance of an inventory of public lands.*

Inventory: University of Hawaii, Hawaii Housing Authority, Department of Education

We requested the UH, the HHA, and the DOE, to send us an inventory of the public lands under their respective control and to indicate, if possible, the ceded or non-ceded status of each parcel.

Only the UH produced a comprehensive, up-to-date land inventory which identifies each parcel under its control by tax map key number, location, acreage, etc. The HHA's inventory is incomplete. The inventory maintained by the DOE is also incomplete and outdated.

None of the agencies has been able to identify the ceded and non-ceded status of its lands or the legal source of title by Admission Act sections and Public Law 88-233. As a result, the specific acreages controlled by the agencies which are

subject to the public land trust of section 5(f) of the Admission Act and to the provisions of HRS chapter 10 are not readily discernible. Under these circumstances, we sought to identify those parcels controlled by each of the agencies that appeared to generate some income and subject those parcels to a brief review to estimate roughly their acreages, their apparent status as ceded or non-ceded lands and the source of Hawaii's title to them.

University controlled lands. The UH controls a total of 53 parcels totaling approximately 1,700 acres. Of this amount, about 1,275 acres or 75 per cent is set aside to the university by various Governor's executive orders. The remaining 425 acres or 25 per cent were acquired by purchase, gift, or grant. Of the 1,275 set aside acres, a large amount is held in fee by the university.

We examined the lands set aside to the university by gubernatorial executive orders. We reasoned that these lands, if any, among the lands set aside to the UH, would likely include ceded lands. From these set aside lands, we identified those that appeared to generate income of some significance. The lands set aside by executive orders that appeared to generate significant revenue include lands used for student and faculty housing.

We have determined that approximately 42 acres at Manoa on which five faculty apartment buildings are situated and 60 acres at Hilo on which four student dormitories are situated are former crown or government lands and are thus ceded lands, title to which passed to Hawaii under section 5(b) of the Admission Act. In addition, it appears that 0.515 acres at Manoa on which sits the Hale Laulima student dormitory, are lands acquired in exchange for former crown or government lands and may thus be considered as ceded lands, title to which passed to Hawaii under section 5(b) of the Admission Act.

Table 4.4

University of Hawaii Ceded and Non-Ceded Lands

Tax Map Key No.	Owner	GEO No.	Date		Total Ceded Acreage	Admission Act Section
3-3-56	UH Manoa--Faculty Housing	1807	10/25/57		42.000	5(b)
2-4-1	UH Hilo--Hilo Campus	1807	10/25/57	29.015		
	including Student Housing	1974	12/02/61	.855		
		2016	04/16/62	3.214		
		2252	12/20/65	26.847		
				59.931	60.000	5(b)
2-8-23	UH Manoa--Hale Laulima Student Dormitory	1807	10/25/57		.515	5(b)
TOTAL CEDED ACREAGE					102.515	

HHA lands. The HHA has had an inventory of the lands it controls on computers since December 1982. The inventory is updated in January of each year. The inventory lists the lands under HHA's jurisdiction by housing projects. For each project, the parcel or parcels of lands are identified by tax map key numbers. For each parcel, the estimated acreage, the method of acquisition (i.e., purchase, grant, executive order, etc.), the source of acquisition (i.e., DLNR, U.S. government, private parties, etc.) and the acquisition date are given.

The inventory groups the projects into two major classes: "housing management projects" and "Act 105 and other projects." "Housing management projects" are essentially projects undertaken pursuant to HRS chapter 359. These projects are designed to provide low-rent housing to low income residents and the elderly. They include projects such as the Mayor Wright Homes, Kuhio Park Terrace, Kalihi Valley Homes, Makua Alii and Punchbowl Homes.

"Act 105 and other projects" includes housing projects authorized by Act 105, SLH 1970, (HRS chapter 359G) and teachers' housing developed and operated under HRS chapter 359A. Most of the projects in this category are Act 105 projects. Under Act 105, the HHA is authorized by itself or in partnership with others to develop residential fee simple or leasehold property, including single dwelling, condominiums and planned units and to sell, lease or rent the completed units, together with the land on which the units sit, at the lowest possible price to qualified residents of the State. Examples of Act 105 projects are the Bishop Museum Tract Homes, Waianae Community Development (Uluwehi) and the Waimanao Village. Other examples are the following turnkey projects on Kauai: the Ho'me Nani and the Kekaha Ha'aheo.

Excluded from the HHA inventory are spot parcels in completed Act 105 developments which have been repurchased by the HHA through its "buy-back" provision. The HHA excludes these parcels from its inventory because their inclusion would result in an inventory that would fluctuate considerably from month to month or even from week to week. The inventory, however, includes lands developed under Act 105 which were sold in leasehold with option to purchase in fee. Until sold in fee, the land is considered to be still under HHA's jurisdiction. The inventory may also include lands which were dedicated (after their original acquisition) to other public agencies for purposes such as public rights of way, easements, roads, etc.

Table 4.5 summarizes the HHA's landholdings as of December 31, 1982.[4]

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4. There has not been any major change in the HHA's inventory since December 1982.

Table 4.5

Summary of Hawaii Housing Authority
Landholdings by Source of Acquisition
as of December 31, 1982

Source of Acquisition	Housing Projects		Act 105 + Other Projects		Total	
	No. Parcels	Acreage	No. Parcels	Acreage	No. Parcels	Acreage
DLNR (Purchase/ grant)	75	109.667	26	174.127	101	283.794
Executive orders	5	35.216	3	2.996	8	38.212
Private	47	144.576	309	796.573	356	941.149
Other Government Agencies	5	34.497	4	4.942	9	39.439
TOTALS	132	323.956	342	978.638	474	1302.594

Source: Hawaii Housing Authority, Land Inventory, December 31, 1982

As shown, the HHA controls 474 parcels which total approximately 1,302.6 acres. Of the total acreage, 322.0 acres were acquired from the DLNR: 283.8 acres through purchases and grants and 38.2 acres under gubernatorial executive orders. About 39.4 acres were acquired from other governmental agencies and some 941.1 acres were acquired from private parties. The 941.1 acres include 600 plus acres at Waiahole Valley on Oahu.

Of the 283.8 acres of land acquired from the DLNR through purchases and grants, 109.7 acres are in the housing management program and 174.1 acres in Act 105 projects. Of the 38.2 acres of land acquired under gubernatorial executive orders, 35.2 acres are being used for public or teacher rental housing, and the remaining 3.0 acres are in Act 105 projects.

A majority of state lands controlled by the DLNR are ceded lands. Thus, it can be expected that a substantial portion of the lands acquired by the HHA from the DLNR consists of ceded lands. This expectation has been confirmed in a review of six major housing projects located on lands acquired from the DLNR that were started and completed by the HHA since November 1978. All of the six projects involved the production of single-family homes, a majority of which were sold in fee to home buyers. A summary of the land parcels involved in the six projects are shown in Table 4.6. As shown, 93 per cent of the projects' total land area and substantially all of the parcels were former government or crown lands and thus ceded lands.

To the extent that the HHA utilizes lands acquired from the DLNR, the programs of the HHA are or may be impacted by HRS chapter 10. Whether any of the HHA controlled ceded lands is subject to chapter 10 is discussed in chapter 7 of this report.

DOE land inventory. The DOE, unlike the UH and the HHA, is not a corporate entity and thus is not empowered to hold title to lands. For the most part, lands used for school and library purposes are either state- or county-owned lands. Shown below is a summary of the lands presently utilized by the DOE:

	Acreage	Per Cent
State-owned lands	1,777	55.0
County-owned lands	1,212	38.0
Leased lands	217	7.0
	3,206	100.0

Table 4.6

Land Parcels of Selected Housing Projects
Involving Land Acquired from DLNR (State)

Project	Acreage			Acreage from DLNR (State)			Acreage from Private Parties		
	Total	Ceded*	Non-Ceded	Total	Ceded*	Non-Ceded	Total	Ceded*	Non-Ceded
Kauhale Aupuni O'Kuliouou (Kuliouou Valley)	52.061	43.057	9.004	43.061	43.057	.004	9.000	--	9.000
Ainaola House Lots III	14.816	14.816	--	14.816	14.816	--	--	--	--
Kealakehe House Lots	16.591	16.591	--	16.591	16.591	--	--	--	--
Kaumana House Lots	8.317	8.317	--	8.317	8.317	--	--	--	--
Puainako II	19.897	19.897	--	19.897	19.897	--	--	--	--
Kawailani	17.072	17.072	--	17.072	17.072	--	--	--	--
TOTALS	128.754	119.750	9.004	119.754	119.750	.004	9.000	--	9.000
PERCENTAGES	100.0%	93.0%	7.0%	100.0%	100.0%	--	100.0%	--	100.0%

Sources: State of Hawaii land patents, deeds and related surveys and maps.

*Described as government (crown) land in land patents and related surveys and maps.

Based on the DLNR's classification of state-owned lands, approximately 559 acres are designated as lands conveyed by section 5(a) of the Admission Act and another 1,272 acres are designated as 5(b) and 5(e) lands. The remaining acreage, which accounts for county-owned lands, could not be designated as either ceded or non-ceded by the DLNR.

Inventory: Counties

Each of the counties maintains a listing or inventory of some sort of the properties under its control. The inventories are of varying degrees of completeness and quality. As in the case of the UH, HHA, and DOE, none of the counties specifically identifies its lands as ceded or non-ceded or by the legal sources of title. Thus what lands are subject to the public land trust and to HRS chapter 10 is not readily discernible. Table 4.7 summarizes the landholdings of each of the counties.

Table 4.7

County Landholdings

County	No. of Parcels	Total Acreage	Acquisition Cost
Honolulu	16,000	14,400	$159.0 million
Hawaii	670	230	8.9 million
Maui	300	2,417	4.3 million
Kauai	250	--	--

The City and County of Honolulu (the city) owns by far the largest inventory of lands. It controls over 16,000 separate land parcels comprising an area of about 14,400 acres. Each of the other counties controls less than 700 parcels comprising a proportionately smaller total land area.

The most common methods by which the counties have acquired their lands are condemnation, purchase, and Governor's executive order. With the first two methods, the fee title to the acquired land rests with the county; with executive orders, the State has retained the fee title, conveying only the right to use the land, usually for specified purposes. Other methods of land acquisition include the use of Governor's proclamation, grants and gifts.

Honolulu. The City and County of Honolulu maintains a comprehensive inventory that is updated on a regular basis. As to each parcel, the inventory lists the user-agency, tax map key number, location, use, acreage, and method, cost and year of acquisition.

The city's land inventory does not distinguish between ceded and non-ceded parcels. However, the acquisition method identified for each parcel gives an indication as to whether the parcel is ceded or non-ceded. The acquisition methods are: (1) condemnation, (2) deed (purchase in fee), (3) Governor's executive order, (4) federal surplus land, (5) dedicated land, and (6) lease.

The only lands controlled by the city that could possibly be ceded lands and subject to the public land trust are those lands set aside to the county by the Governor's executive orders. This is based on our understanding that most, if not all, of the parcels acquired by condemnation and deed were acquired from private parties and, therefore, would not fall within the classification of ceded lands subject to the public trust. Federal surplus and dedicated lands could be ceded; however, they are insignificant in terms of the total acreage. Parcels leased by the city from private parties are, of course, non-ceded, non-trust lands.

We identified those lands listed in the inventory which appeared to have been acquired by the city through gubernatorial executive orders and which appeared to

be revenue producing. We examined these parcels to determine whether they are subject to the public land trust. Our review discerned that only the following parcels are possibly ceded lands subject to the trust: Kapiolani Park, Ala Moana Beach Park, and a portion of the off-street parking lot between Smith and Maunakea Streets.

The Ala Wai Golf Course was initially thought to be also ceded land subject to the trust. However, it appears that the Ala Wai Golf Course land, owned by the State but set aside to the city for use as a golf course by a Governor's executive order, consists of many smaller parcels acquired by the Territory of Hawaii from private parties.

There are other city-owned off-street parking lots in addition to the one situated between Smith Street and Maunakea Street. However, our finding is that the underlying lands in these other parking lots were acquired by the city through condemnation.

1. *Kapiolani Park.* It appears that Kapiolani Park consists of ceded land. It is owned by the State but controlled by the city through a Governor's executive order issued during the territorial period. It appears that title to the parcel was conveyed to Hawaii under section 5(b) of the Admission Act and is thus subject to the public land trust and possibly to chapter 10. Kapiolani Park generates income to the city through rentals of the Waikiki Shell, the parking meters at the zoo, and concession fees from the Kapiolani Park driving range, Waikiki Shell Camera Shop, Waikiki Shell Hula Show Lei Vendors, and Waikiki Shell Hula Show.

2. *Ala Moana Beach Park.* The lands underlying the Ala Moana Beach Park appear to be largely comprised of reclaimed tidal or submerged lands, the title to which the United States apparently obtained upon Hawaii's annexation in 1898. It

appears that the lands are, therefore, ceded lands. In 1927, the title to the lands was transferred to the Territory of Hawaii by a presidential proclamation. Subsequently, in 1928, the territorial governor conveyed the lands to the City and County of Honolulu by proclamation. The proclamation stipulated that in the event the lands ceased to be used as a public park or for other similar public purposes, they would revert to the Territory (State).

Because title to the lands was transferred to the Territory before statehood, the lands apparently fall under section 5(a) of the Admission Act and are not part of the public land trust and are not subject to chapter 10.

The revenues for Ala Moana Park are limited to the food concessions located in the park.

3. ***Parking lot.*** A portion of the parking lot situated between Smith Street and Maunakea Street was acquired by the city under a gubernatorial executive order. The remainder of the parking lot was acquired by the city through condemnation of private lands. That portion acquired under gubernatorial executive order appears clearly to be ceded lands, title to which was acquired by the State of Hawaii under section 5(b) of the Admission Act.

Hawaii. The County of Hawaii maintains a "Real Property Inventory" that lists each land parcel controlled by the county by tax map key number. Each parcel is described by type (fee, leasehold, etc.), location, use, area and cost.

As in the case of the other counties, the inventory does not distinguish between ceded and non-ceded parcels. For each parcel, however, one of four codes is indicated. The four codes are: blank (owned in fee), license (use obtained by permit), leasehold (use obtained by lease), and executive order (use obtained by executive order).

It is our understanding that a majority of the parcels owned in fee were acquired by the county by cash purchase from private parties or by condemnation. The fee-owned parcels generally are not ceded lands. The parcels under leases and permits are, by definition, non-ceded lands. Only those parcels acquired through executive orders are possibly ceded lands, subject to the public land trust.

Of the lands acquired through executive orders, we identified only one as producing any significant amount of revenues. That parcel is the Hilo Municipal Golf Course. The golf course is comprised of two parcels totaling 165 acres, as follows:

Parcel Number	Owner	Total Acreage	Ceded Acreage	Non-Ceded Acreage
1	State of Hawaii	145	145	--
2	County of Hawaii	20	--	20
	TOTAL	165	145	20

Parcel 1 consists of 145 acres which were conveyed to the county of Executive Order No. 1223 on March 1, 1948. The entire 145 acres were former crown lands. Parcel 2 was formerly government land which was sold by the Territory to a private party in 1925. The county subsequently purchased this parcel from the private party in 1972. Parcel 1 may be considered to be ceded lands, but Parcel 2 lost its ceded status upon its sale to a private party in 1925. We do not think it can now be considered as ceded land, nor can it be said to be subject to the public land trust or to HRS chapter 10. Parcel 1 is subject to the trust and possibly to chapter 10, because title to the parcel vested in Hawaii on statehood under section 5(b) of the Admission Act.

Maui. The County of Maui maintains a list of the lands it controls. As to each parcel, the list describes the area, tax map key number, purpose of acquisition, year acquired, and original cost.

The inventory does not identify parcels as ceded or non-ceded. It is our understanding, however, that a majority of the county-owned parcels were acquired from private parties through condemnation or purchase. These parcels are not ceded lands. Only those parcels acquired under executive orders may be considered possibly ceded and subject to the land trust.

The only real revenue-generating land acquired by executive orders appears to be the county-operated Waiehu Golf Course.

The land underlying the Waiehu Golf Course is comprised of five separate parcels with a total land area of 178 acres. Three of the parcels (69 per cent of the total area) are state-owned and under executive order to the county. The remaining two parcels (31 per cent of the total area) are property acquired by the county through condemnation. These two parcels are clearly not ceded lands and not subject to the trust provisions of section 5(f) of the Admission Act or to the provisions of HRS chapter 10.

Of the state-owned parcels, 43 acres were acquired by the Territory of Hawaii from a private party in 1928. This land is, thus, not ceded and title to it passed to the State under section 5(a) of the Admission Act. The rest of the state-owned acreage is described in the conveying executive order as former government land and appears to be ceded, title passing to the State under section 5(b) of the Admission Act.

Kauai. The County of Kauai does not maintain a comprehensive land inventory. There is however, a listing of properties by real property tax key numbers ("Real Property Exemptions by Exemption Code") from which some information on lands controlled by the county can be obtained. According to the

listing, the county currently controls about 250 separate parcels. Several of these parcels are owned by private entities and are being used by the county. A majority of the parcels are owned by the county and the State. The large number of state-owned parcels suggests that a significant portion may be former crown or government lands. It is our understanding that all state-owned parcels controlled by the county have been classified by Admission Act sections and are included in the DLNR's state land inventory.

The only state-owned parcel under the control of the County of Kauai that produces any significant amount of revenues is the county's Wailua Golf Course. Green and locker fees, and rents and concessions comprise the revenues.

The golf course consists of 195 acres. The land underlying the golf course is owned by the State and is controlled by the county under two Governor's executive orders, issued during the territorial period. Executive Order No. 97 issued on April 20, 1921, granted use of 190 acres to the county, and Executive Order No. 112 dated May 10, 1945, granted use of 4.51 acres. Based upon a limited review of available documentation, it appears that the entire golf course rests on former crown or government land which had been ceded to the United States on annexation. Title to the parcel appears to have been conveyed to the State under section 5(b) of the Admission Act.

Sand Island

Sand Island includes about 507 acres of land plus surrounding submerged lands. Most of the 507 acres are filled lands. Forty-nine acres of the 507 acres are still set aside for the use of the United States government. The 49 acres are being used

for coast guard purposes. A portion of the remaining 458 acres is used for harbor purposes and included in the Honolulu Harbor boundaries. The remainder of the island is under the management of the Department of Land and Natural Resources.

Sand Island is all ceded lands. However, for a time in the 1900s there was a continuing dispute as to the ceded or non-ceded status of the island, and upon the enactment of HRS chapter 10, particularly section 10-13.5, this issue of ceded versus non-ceded status of Sand Island surfaced again briefly. Today, no one denies the ceded status of Sand Island.

The major concern with Sand Island is whether the DLNR has properly classified the lands in terms of the statutory source of Hawaii's title to the lands.

It is our finding that the DLNR's classification of lands on Sand Island is technically correct. However, we believe that all of Sand Island should be considered a part of the trust established by section 5(f) of the Admission Act and possibly subject to HRS chapter 10.

A summary of transfer of fee title to Hawaii. At annexation, the U.S. took over Sand Island, which at that time consisted of less than 10 acres of land. It was set aside by presidential executive order for use by the United States as a military reservation. Between 1902 and 1941, the Army and Navy filled the surrounding reefs from materials dredged from the entrance to Honolulu Harbor and Keehi Lagoon.

Sand Island was returned to Hawaii in three segments. The first segment consisted of 16 acres. By two presidential executive orders, one in 1946 and the other in 1947, the Territory of Hawaii acquired the possession, use, and control of,

but not fee title to, the 16 acres.[5] The DLNR has treated the 16 acres as lands, the fee title to which was returned to Hawaii at statehood under section 5(b) of the Admission Act.

In 1955, the territorial government sought title to some 202 acres of Sand Island. The impetus to gain the fee title to the land came from an offer by the Standard Oil Company of California to purchase the 202-acre site for its $30 million oil refinery. This site was conveyed to the Territory on August 20, 1959, one day before statehood, by Presidential Executive Order No. 10833. Since the return was before statehood, the 202 acres have been classified by the DLNR as lands returned to Hawaii under section 5(a) of the Admission Act.

The final transfer occurred in 1963 when another 360 acres were conveyed under the Revised Conveyance Act (Public Law 88-233). Of the 360 acres, approximately 244 acres are landed property. Another 116 acres are still submerged.

Appended to this chapter are maps of Sand Island. Map A depicts the return of the various parcels to Hawaii. Map B shows the uses to which the parcels returned to Hawaii are currently being put. Map C is the same as map A, less the submerged portions. Map D shows those portions of the 202 acres that were returned to Hawaii one day before statehood and those portions of the 244 landed acres that were returned to the State in 1963 that are being used as a container yard and marginal wharf under the jurisdiction of the DOT.

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5. Of the 16 acres, 12 acres previously set aside in 1920 by Presidential Executive Order No. 3358 for military purposes were restored in Presidential Executive Order No. 9752 for a sewerage treatment plant. Another four acres were restored under Presidential Executive Order No. 9860. The four acres, which are part of the Keehi Lagoon seaplane runway, are submerged and not included in the 507 acres that comprise Sand Island's landed property.

Controversy over the ceded status. Although it is generally agreed that the lands on Sand Island are ceded lands, it is appropriate that we review briefly the controversy over the ceded, non-ceded status of the lands. We do so for two reasons: first, the issue needs to be put to rest; second, the ceded, non-ceded controversy has impacted the question of the entitlement of OHA to the revenues generated on Sand Island.

Our study of the matter leads us to conclude that the lands on Sand Island are indeed ceded lands. They were owned by the Republic of Hawaii at the time of annexation, and upon annexation, the United States succeeded to the Republic's title to the lands.

Sand Island lies within what used to be the Mokauea and Kaholaloa fishing grounds. Sand Island as we know it today was essentially built by filling the reefs within these grounds. The controversy over whether Sand Island consists of ceded or non-ceded lands arose largely from the Land Commission awards made of the Mokauea and Kaholaloa fisheries. The Land Commission which was established in 1846[6] to adjudicate all private claims to landed property acquired before 1846, awarded the fishing grounds to private individuals. Moreover, in making the awards, it used language which appeared to grant the fee title to the lands beneath the fisheries (the submerged lands).

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6. An Act to Organize the Executive Department of the Hawaiian Islands Pt 1, Ch Vii, Art IV; April 27, 1846. Section 1 states in part that "His Majesty shall appoint through the Minister of the Interior and upon consultation with the Privy Council, five Commissioners, one of whom shall be the Attorney General of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners to any landed property acquired anterior to the passage of this Act; the awards of which unless appealed from as hereinafter allowed shall be binding upon the Minister of the Interior and upon the applicant. . . ."

Had the Land Commission the authority to make the awards in the first instance and to award the fee to the lands beneath the fisheries, the awards would have deprived the Republic of Hawaii of title to the fisheries and the lands beneath them, and Sand Island today would not be considered as ceded lands.

However, it does not appear that the Land Commission had the authority to make awards of fishing grounds or the lands beneath the fisheries. The Land Commission's authority extended only to making grants of landed property. Fishing rights had been conferred initially by King Kamehameha III in 1839,[7] and in subsequent years the Republic of Hawaii enacted laws governing fisheries and fishing rights as a means of regulating and controlling the coastal waters and its fish. As the term implies, fishing rights were simply rights to fish in defined coastal areas.

The dispute came to the fore upon the enactment of the Organic Act. A portion of the act brought to an end the exclusive rights to fish in the sea waters of the islands that had been conferred to individual persons by the laws of Kamehameha III.

Soon after the enactment of the Organic Act, those who had received Land Commission awards to fishing grounds brought suit to confirm their title to the fishing grounds and the lands beneath the fisheries. In one case, the Land Commission eliminated in a subsequent order the fishing ground from its award, and the awardee petitioned the court to re-establish its claim to the fishery. In that case, the court awarded the fishery rights to the awardee but the Territory of Hawaii took strong exceptions to the judgment.

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7. Laws of 1839, chapter 3, section 8.

All cases relating to the Mokauea and Kaholaloa fisheries ended in a settlement between the parties. As part of the settlement, all fishing rights, title and interest in the Mokauea and Kaholaloa fisheries were quitclaimed to the Territory of Hawaii and the awardees received other lands in exchange.

Although the court in one case held for the awardee, the position of the government of Hawaii and that of the United States has consistently been (and we believe rightly so) that the Land Commission had no authority to make awards of fishing grounds and that the private claims to the fisheries were not valid. The present treatment by the State of Sand Island as ceded lands is consistent with this early position.

The return of 202 acres. About 1955, the territorial government received an offer from the Standard Oil Company of California to purchase a 202-acre site on Sand Island for its $30 million oil refinery. All of Sand Island, however, had been set aside by presidential executive order for the use of the United States. Hawaii, therefore, needed to have the acreage returned to Hawaii's control before it could sell the site to Standard Oil. The Territory of Hawaii initiated action to have the 202-acre site returned to Hawaii.

However, the transfer of the lands to Hawaii was not easily accomplished. Between 1955 and 1956, the U.S. Department of Justice wrestled with the question, whether a presidential executive order would be sufficient to transfer the lands to the territory, or whether an act of Congress was also required. Although section 91 of the Organic Act provided that public property ceded at annexation for the uses and purposes of the United States could be restored to its previous status by the direction of the President, the U.S. Department of Justice was troubled by the earlier asserted private claims to the fisheries and it questioned, assuming that Sand

Island constituted ceded lands, whether the 202-acre site, ceded as submerged land could be restored under section 91 as filled land.

In view of the fact that the Territory intended to sell the filled land and therefore required clear title, the U.S. Department of Justice ruled in late 1956 that special congressional legislation would be required to enable the President to return the land by executive order.

On January 21, 1958, Hawaii's delegate to Congress, the late John A. Burns, introduced HR 10173. The purpose of this bill was "to authorize the President, by executive order, to transfer to the Territory of Hawaii, without monetary reimbursement, not to exceed 202 acres of the Sand Island Military Reservation. . . ." According to Senate Committee Report No. 2257, which accompanied the bill,

> "It appears that an Executive order may not be sufficient in this instance, however, for although the lands in question appear to be public lands ceded within the meaning of the Hawaiian Organic Act, there is some question whether they may be sold or otherwise disposed of by the Territory. This question arises because portions of Sand Island are made up of land filled in subsequent to annexation. Inasmuch as the Sand Island property is likely to be a useful site for commercial development, it is desirable that the Territory have full authority to dispose of such portions of the land as are not required for military purposes."

HR 10173 became law (Public Law 85-756) on August 25, 1958; however, actual transfer of the 202 acres did not occur immediately. There was some difficulty in negotiating the exact parcel to be transferred. At one point, talks were stalled because the Army claimed that part of the area sought by the Territory was needed for a highly classified missile site.

When it became clear that Hawaii would attain statehood, efforts to transfer the 202-acre site by executive order intensified. The territorial government and Hawaii's delegate to Congress expressed concern that Public Law 85-756 would be

invalidated once Hawaii became a state because the law made specific reference to Hawaii as a territory, and not as a state. The territorial government reasoned that if Hawaii became a state before the executive order was signed by the President, new congressional legislation would be required and the transfer of land, which had been delayed for almost four years, would be further delayed. On August 20, 1959, one day before statehood, title to the 202 acres of Sand Island was transferred to the Territory by Presidential Executive Order No. 10833.

The treatment accorded the 202 acres. Since the presidential executive order returning the 202 acres to Hawaii was signed before Hawaii became a state, the acreage is listed in the state inventory as having been received by Hawaii under section 5(a) of the Admission Act. As section 5(a) land, the 202-acre site is not subject to the section 5(f) trust or to HRS chapter 10.

Technically, the listing of the acreage as section 5(a) land is correct. However, there is no good reason why the 202 acres should not be treated in the same manner as the 244 acres of landed property that were conveyed to Hawaii (together with the 116 acres of submerged lands) in 1963 under Public Law 88-233. First, the only reason for the transfer of the 202 acres to Hawaii one day before statehood was the fear of the need for another congressional act if the land was not transferred before statehood. There was no other reason for the urgency to convey, for Standard Oil in 1958 had decided to locate its refinery on Campbell Estate land at Barbers Point. Second, had the President not signed the executive order and the 202 acres not been transferred to Hawaii on August 20, 1959, in all probability, the 202 acres would have been conveyed to Hawaii after statehood under Public Law 88-233 in the same manner (and possibly at the same time) as the conveyance of the 244 acres. Thus, it would appear to be fair to treat the 202-acre site the same as

the 244-acre site and subject it to the public trust of section 5(f) of the Admission Act. Although legislative action may be necessary to accomplish this legally, we think that equity supports this treatment.

As a footnote, we observe that the 244 acres were conveyed to Hawaii under Public Law 88-233, rather than under section 5(e) of the Admission Act, even though the conveyance was had within the five-year review period provided in section 5(e), because of the same two problems that compelled the U.S. Department of Justice to require congressional authority for the conveyance of the 202-acre site--the earlier asserted private claims to what used to be the Mokauea and Kaholaloa fishing grounds, and the questionable ability of the United States to return to Hawaii as filled lands what the United States had received on annexation as submerged lands.

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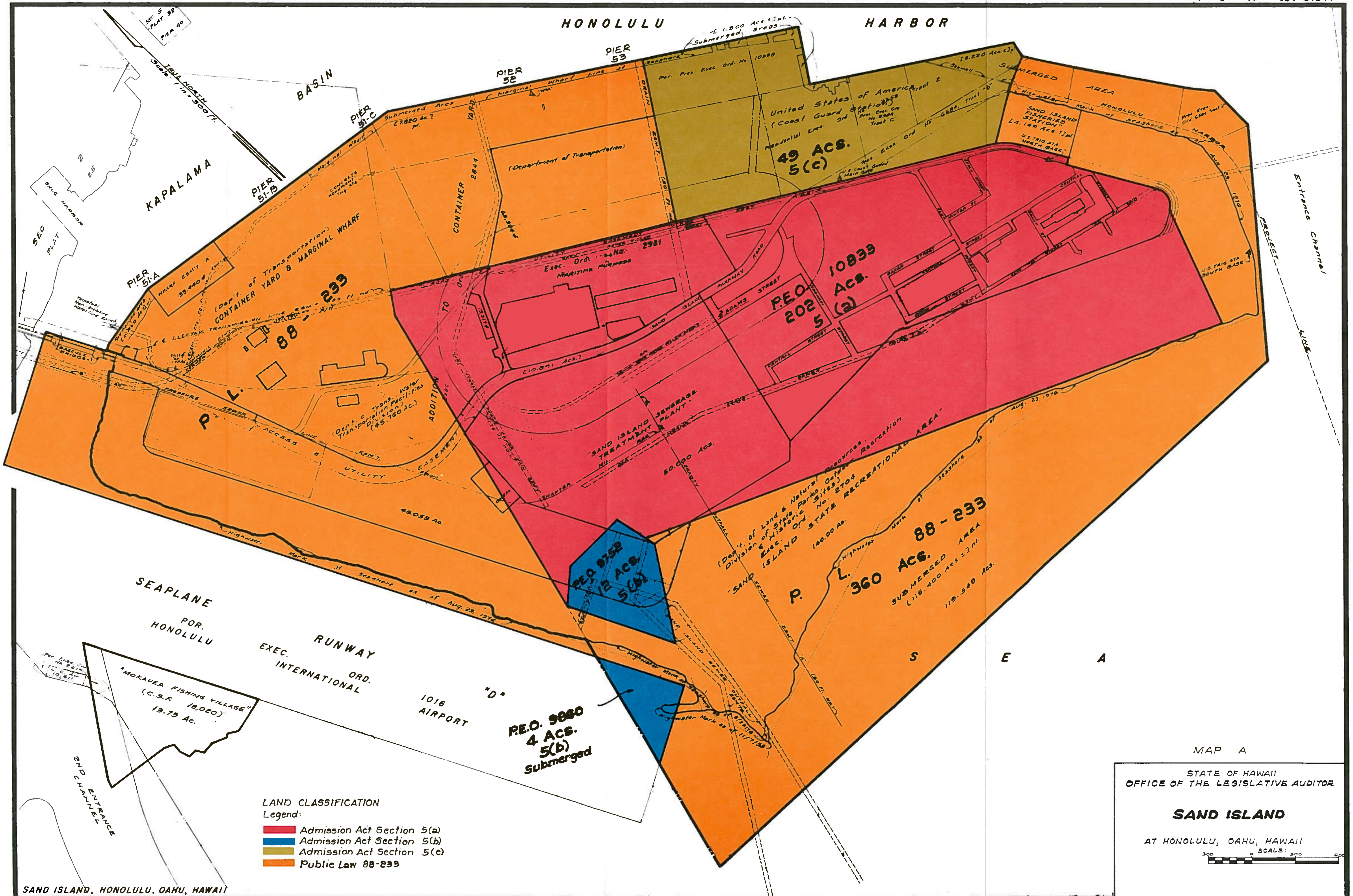
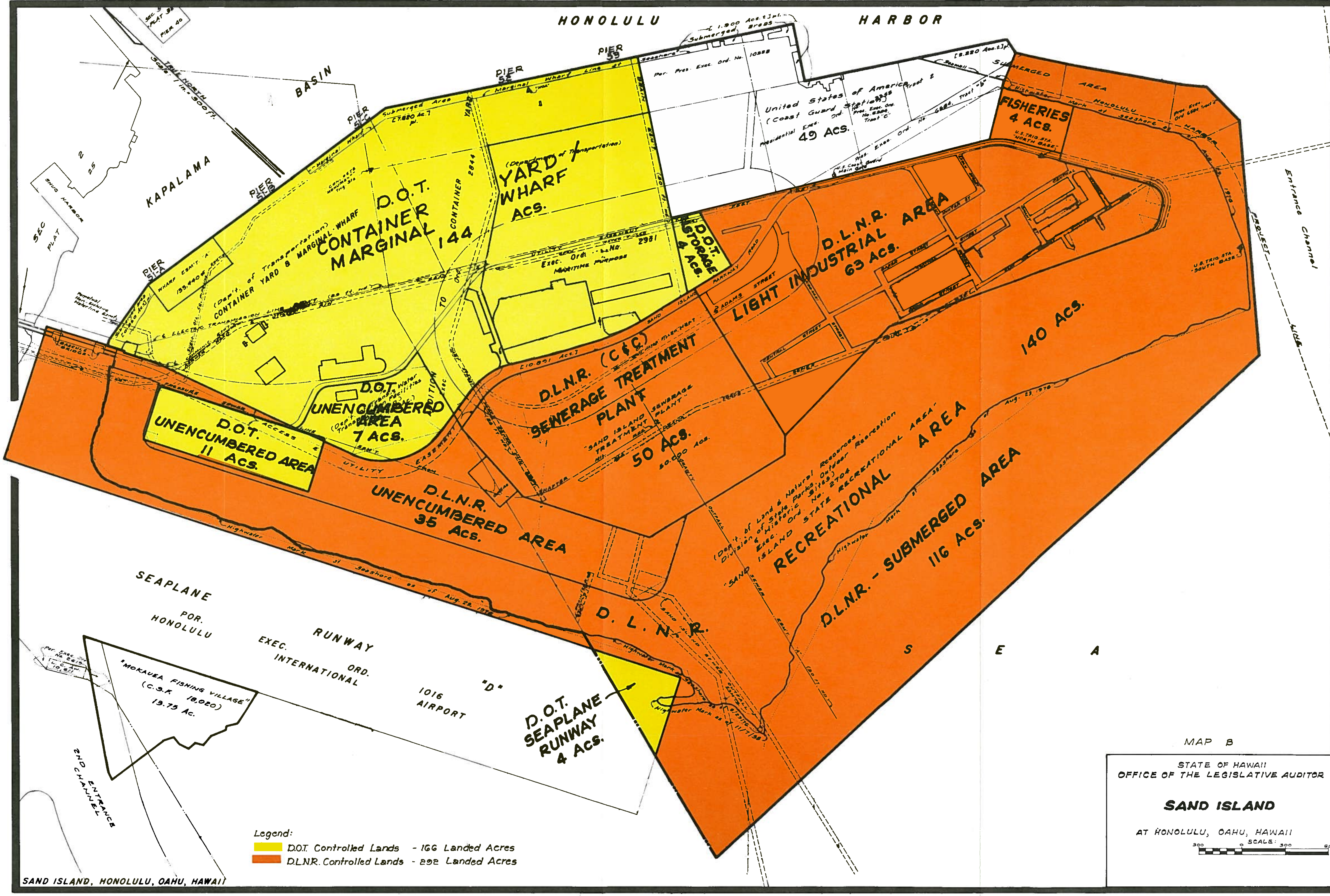
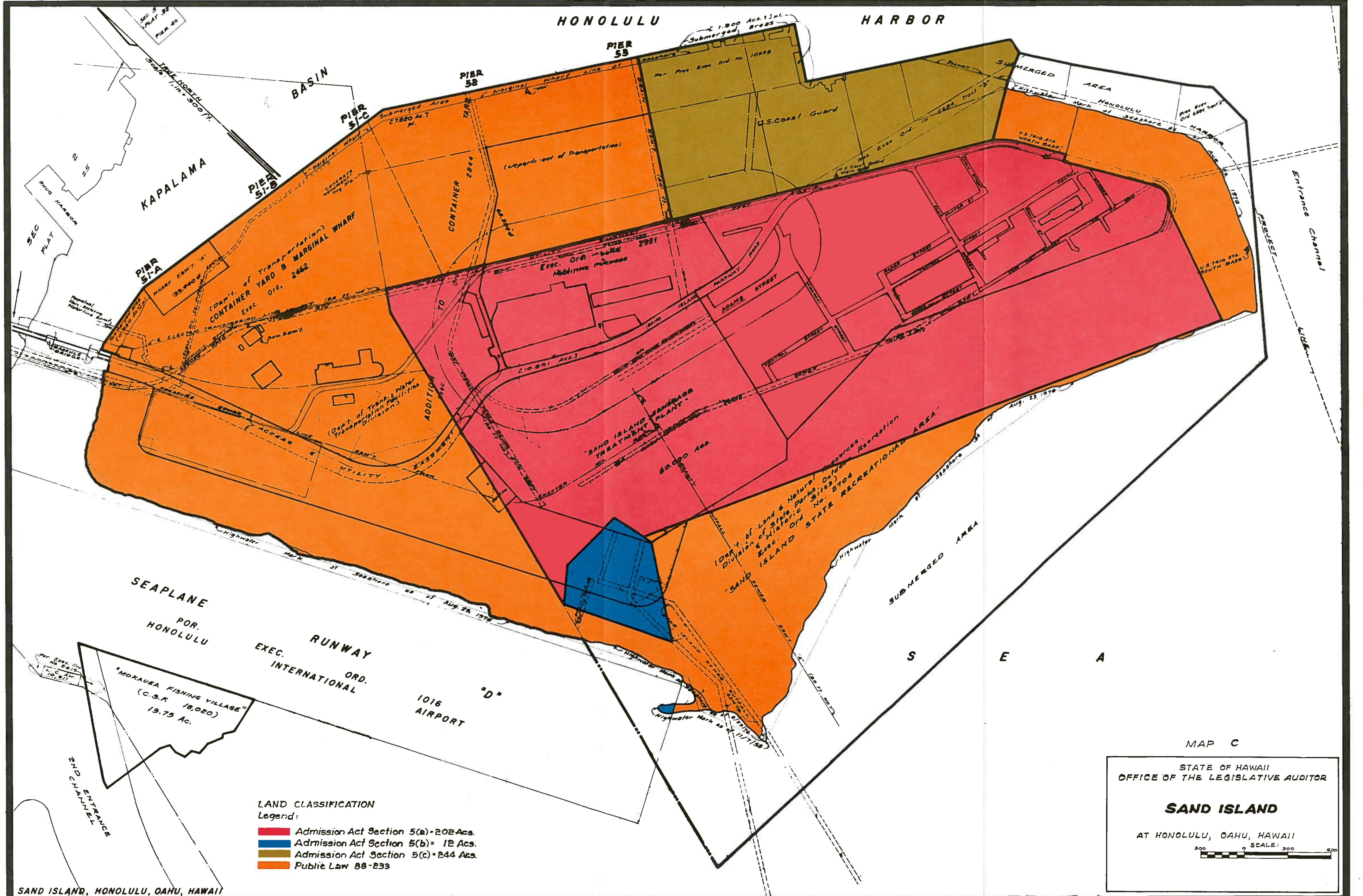
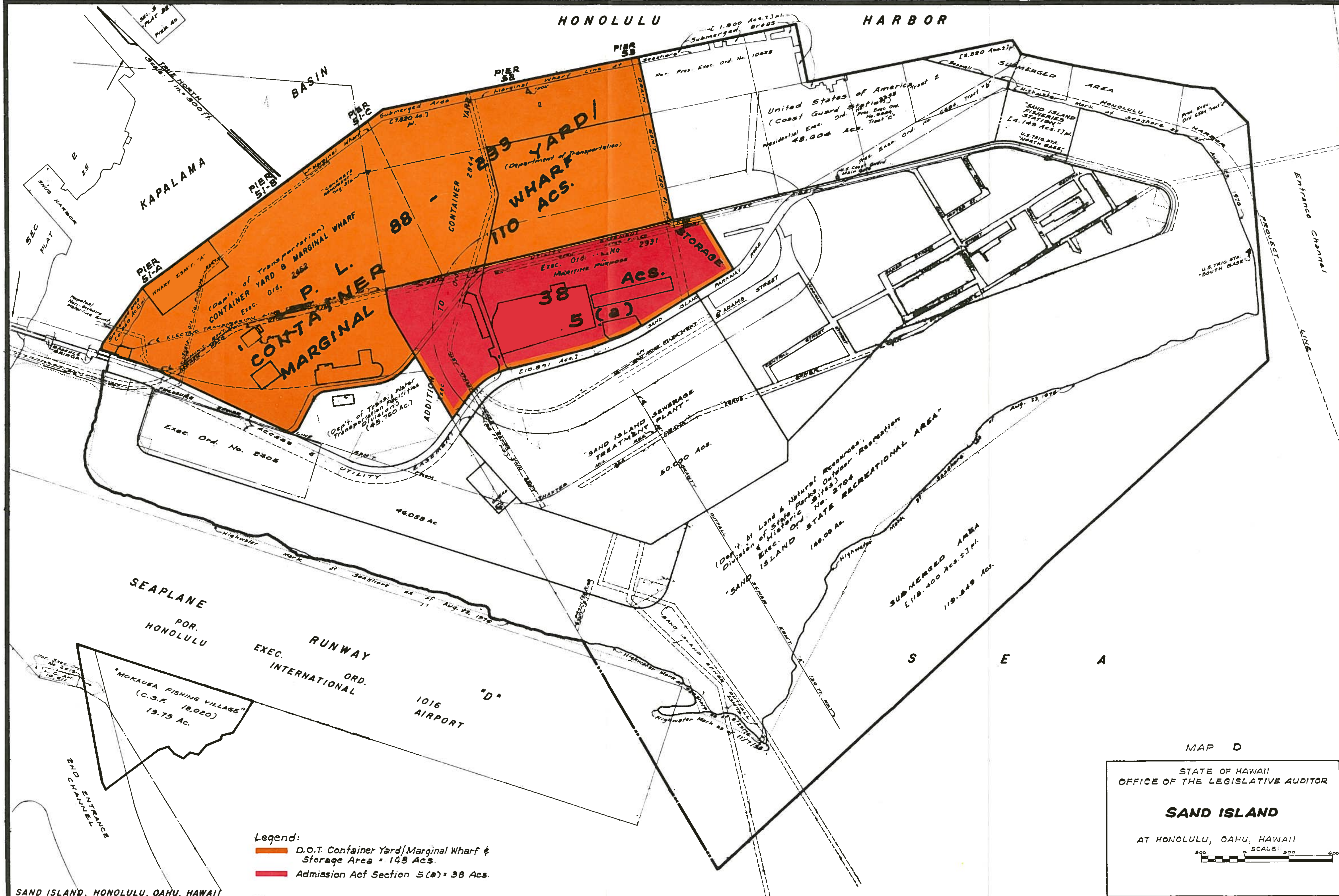
1 5 41 1ST DIST.




HONOLULU HARBOR
KAPALAMA BASIN
D.O.T. CONTAINER MARGINAL 144
YARD / WHARF Acs.
D.O.T. STORAGE 4 Acs.
United States of America (Coast Guard Station) Presidential Exec. Ord. No. 49 Acs.
FISHERIES 4 Acs.
D.L.N.R. LIGHT INDUSTRIAL AREA 63 Acs.
140 Acs.
D.L.N.R. (C&C) SEWERAGE TREATMENT PLANT 50 Acs.
D.O.T. UNENCUMBERED AREA 7 Acs.
D.O.T. UNENCUMBERED AREA 11 Acs.
D.L.N.R. UNENCUMBERED AREA 35 Acs.
SAND ISLAND STATE RECREATIONAL AREA
RECREATIONAL AREA
D.L.N.R. - SUBMERGED AREA 116 Acs.
D.L.N.R.
D.O.T. SEAPLANE RUNWAY 4 Acs.
SEAPLANE RUNWAY "D" POR. HONOLULU INTERNATIONAL AIRPORT EXEC. ORD. 1016
"MOKAUEA FISHING VILLAGE" (C.S.F. 18,020) 13.75 Ac.
2ND ENTRANCE CHANNEL
Entrance Channel
PROJECT LINE
SEA
MAP B
STATE OF HAWAII
OFFICE OF THE LEGISLATIVE AUDITOR
SAND ISLAND
AT HONOLULU, OAHU, HAWAII
SCALE
Legend:
D.O.T. Controlled Lands - 166 Landed Acres
D.L.N.R. Controlled Lands - 292 Landed Acres
SAND ISLAND, HONOLULU, OAHU, HAWAII


HONOLULU HARBOR
PIER 53
PIER 52
PIER 51-C
PIER 51-B
PIER 51-A
BASIN
KAPALAMA
U.S. Coast Guard
CONTAINER YARD
(Department of Transportation)
CONTAINER YARD & MARGINAL WHARF
Exec. Ord. 2452
ADAMS STREET
"SAND ISLAND SEWAGE TREATMENT PLANT"
SUBMERGED AREA
SAND ISLAND STATE RECREATION AREA
SEAPLANE RUNWAY "D"
POR. HONOLULU INTERNATIONAL AIRPORT
EXEC. ORD. 1016
"MOKAUEA FISHING VILLAGE"
(C.S.F. 18,020)
19.75 Ac.
2ND ENTRANCE CHANNEL
Entrance Channel
S E A
LAND CLASSIFICATION
Legend:
Admission Act Section 5(a) - 202 Acs.
Admission Act Section 5(b) = 12 Acs.
Admission Act Section 5(c) - 244 Acs.
Public Law 88-233
SAND ISLAND, HONOLULU, OAHU, HAWAII
MAP C
STATE OF HAWAII
OFFICE OF THE LEGISLATIVE AUDITOR
SAND ISLAND
AT HONOLULU, OAHU, HAWAII
SCALE:
300
0
300
600


HONOLULU HARBOR
KAPALAMA BASIN
PIER 51-A
PIER 51-B
PIER 51-C
PIER 52
PIER 53
CONTAINER YARD & MARGINAL WHARF
P. L. 88-233
CONTAINER YARD / WHARF
110 ACS.
38 ACS.
5 (a)
STORAGE
MARGINAL CONTAINER
"SAND ISLAND SEWAGE TREATMENT PLANT"
50.000 Acs.
SAND ISLAND STATE RECREATIONAL AREA
140.00 Acs.
SUBMERGED AREA
119.349 Acs.
SEAPLANE RUNWAY "D"
POR. HONOLULU INTERNATIONAL AIRPORT
EXEC. ORD. 1016
"MOKAUEA FISHING VILLAGE"
13.75 Ac.
46.059 Ac.
Exec. Ord. No. 2405
SEA
Entrance Channel
2ND ENTRANCE CHANNEL
Legend:
D.O.T. Container Yard/Marginal Wharf & Storage Area = 148 Acs.
Admission Act Section 5(a) = 38 Acs.
MAP D
STATE OF HAWAII
OFFICE OF THE LEGISLATIVE AUDITOR
SAND ISLAND
AT HONOLULU, OAHU, HAWAII
SCALE
SAND ISLAND, HONOLULU, OAHU, HAWAII

Chapter 5

INVENTORY: AIRPORTS

Hawaii's public airports are operated and maintained by the state Department of Transportation through its airports division. There are 14 public airports in Hawaii. Since 1968, these public airports have been operated as a single system. The major public airports are the Honolulu International Airport, the General Lyman Field, the Kahului Airport, and the Lihue Airport.

This chapter contains our findings concerning the accuracy with which the lands at the Honolulu International Airport, the General Lyman Field, and the Molokai Airport are listed on the state inventory. The Honolulu International Airport is the largest airport in terms of both acreage and revenues generated. The General Lyman Field and the Molokai Airport are of interest since they include Hawaiian home lands.

The relevant appendices here are appendices A, B, and C. The maps in the appendices were prepared by the cadastral section of the highways division of the state Department of Transportation. As stated earlier, for the Honolulu International Airport, the boundary survey necessary for mapping included field surveys. For the other airports, initial and intervening maps and available data were examined and reconciled and visual inspections were conducted in determining the boundaries of the airports. The boundaries presented in the maps are believed to be reasonably accurate.

Honolulu International Airport

The maps. In appendix A are the maps that resulted from the boundary survey of the Honolulu International Airport. There are eight sheets of maps, including a supplementary sheet. The present physical boundaries of the airport are outlined on each map. There are two parcels of land (parcels 8 and 9) which are not really a part of the airport. They are, however, currently under the jurisdiction of the airports division of the DOT and are treated as if they are a part of the airport. They are, therefore, included on the maps within the airport boundaries. There are two other parcels (parcels 2–D and 7–B–1–C) (see sheet no. 5) that are not a part of the airport but are included within the outer boundaries of the airport. These parcels are not owned by the State of Hawaii; they are currently still owned by the United States government.

Sheet no. 1 of the maps shows the parcels of land (11 in number) that were, at annexation, within the present physical boundaries of the Honolulu International Airport. Parcels 1, 2, 3, and 4 were privately–owned at that time, and parcels 5 through 11 were government lands. Parcels 5 through 11 were ceded to the United States upon annexation.

Sheet nos. 2, 3, 4, and 5 show how the original 11 parcels were divided and subdivided into smaller parcels for purposes of transferring title or transferring the use, possession, and control of the lands between and among private owners, the Territory and State of Hawaii, and the federal government. Sheet nos. 2 and 3 are concerned with land transfers occurring during the territorial period, and sheet nos. 4 and 5 deal with transfers occurring after statehood. The transfers of specific parcels as divided and subdivided are noted in the chain of title explanation attached to the maps.

Sheet no. 6 depicts our conclusion as to the inclusions and exclusions of the various parcels at the airport from the public land trust provided in section 5(f) of the Admission Act.

Sheet no. 7 provides a pictorial view of the parcels in terms of the character of the lands at the airport: submerged lands, awarded lands, registered lands, and filled lands.

The supplemental sheet shows the Governor's executive orders under which the various parcels within the boundaries of the Honolulu International Airport were set aside for airport uses. The executive orders are as of September 1984. The sheet was prepared sometime after sheet nos. 1 to 7 had been drawn, and, thus, it includes one additional parcel (parcel 12) that was added to the Honolulu International Airport by an executive order issued after the previous 7 sheets of maps were completed.

The acreage and classification of lands. It is our finding that the State of Hawaii owns an aggregate of 4,422.5 acres (more or less) of land at the Honolulu International Airport, including parcel 12. We determined for each parcel the legal authority under which the State of Hawaii acquired the fee title to the parcel as follows (see also sheet no. 6 of the maps):

Parcel Number	Legal Authority Under Which Title Acquired
1-A	5(a), 5(b), x
1-B	5(a)
1-C	5(b)
1-D	Other
2-A	Other
2-B	Other
2-C	Other
3	5(a)
4	5(a)
5-A	5(b)
5-B	5(a)
5-C	Other
5-D	Other
6-A	Public Law 88-233
6-B	Public Law 88-233
6-C	5(b)
7-A-1	Public Law 88-233
7-A-2	5(a)
7-B-1-A	Public Law 88-233
7-B-1-B	Public Law 88-233
7-B-2	Public Law 88-233
7-B-3	Public Law 88-233
7-B-4	5(b)
7-C-1-A	Public Law 88-233
7-C-1-B	Public Law 88-233
7-C-2	Public Law 88-233
7-C-3	5(b)
7-C-4	5(b)
8-A	5(b)
8-B	5(e)
9-A	5(b)
9-B	5(e)
9-C	Public Law 88-233
10	5(b)
11	5(b)
12	x

The ceded and non-ceded acreages within each category are as follows:

Legal Source of Title	Acreage	
	Ceded	Non-Ceded
5(a)	351.8	239.6
5(b)	2,760.4	--
5(e)	14.1	--
Public Law 88-233	651.7	--
Other	--	310.4
X	--	94.5
	3778.0	644.5

Table 5.1 compares the acreages above with those noted on the state inventory prepared by the Department of Land and Natural Resources and those kept by the Department of Transportation, airports division.

Some observations. We note here some pertinent facts which explain the classification accorded some of the parcels.

1. ***Parcel 1-A.*** Parcel 1-A consists of many small lots; they number in the hundreds. They include both ceded and non-ceded lands. Some of these lots are U.S. fee simple lands. The chain of title report indicates how many acres of parcel 1-A are section 5(a) lands, how many acres are "x" lands, and how many acres are U.S. fee simple lands. Due to the large number of small lots included in the parcel, we have not broken parcel 1-A into smaller parcels. For the purposes of this report, it is not necessary to do so, since no part of the parcel is subject to the public land trust.

2. ***Exchanged lands.*** Parcels 1-C and 5-A were initially privately-owned lands. They were acquired by the United States by condemnation in 1935. In 1942, the United States quitclaimed the parcels by a deed to the Territory of Hawaii. Since Hawaii acquired the fee title to the parcels before statehood, it would seem that parcels 1-C and 5-A should be classified as section 5(a) lands. We have,

Table 5.1

Honolulu International Airport
Ceded and Non-Ceded Acreage by Legal Source of Title
as Determined by the Office of the Legislative Auditor,
the Department of Land and Natural Resources,
and the Airports Division

Legal Source of Title	Acreage		Total Acreage
	Ceded	Non-Ceded	
Legislative Auditor			
5(a)	351.8	239.6	591.4
5(b)	2,760.4	--	2,760.4
5(e)	14.1	--	14.1
P.L. 88-233	651.7	--	651.7
Other	--	310.4	310.4
X	--	94.5	94.5
TOTAL	3,778.0	644.5	4,422.5
Department of Land and Natural Resources			
5(a)	467.0	180.9	647.9
5(b)	3,050.1	--	3,050.1
P.L. 88-233	517.0	--	517.0
X*	--	265.1	265.1
TOTAL	4,034.1	446.0	4,480.1
Airports Division			
5(a)	--	791.3	791.3
5(b)	2,953.7	--	2,953.7
X**	--	665.8	665.8
TOTAL	2,953.7	1,457.1	4,410.8

*Lands acquired from private individuals after statehood.

**Lands acquired from private individuals and the United States after statehood.

however, concluded that parcels 1-C and 5-A should be classified as section 5(b) lands because these parcels were acquired by the Territory of Hawaii from the United States in exchange for ceded lands which were then under the possession, use, and control of the Territory of Hawaii.

Under the Organic Act, section 73(q), lands conveyed to the Territory in exchange for other lands that were subject to the land laws of Hawaii (including ceded lands) assumed the same status as if they had previously been public lands of Hawaii. Thus, when Hawaii acquired parcels 1-C and 5-A from the United States, those parcels assumed the same status as the ceded lands set aside to the United States government in exchange. Title to the ceded lands given in exchange had been vested in the United States. Thus, title to parcels 1-C and 5-A remained in the United States, notwithstanding the quitclaim deed, Hawaii having acquired the equitable right to possess, use, and control the parcels. Upon attaining statehood, Hawaii succeeded to the title of the United States in those parcels under section 5(b) of the Admission Act.

3. ***Federal Airport Act/Federal Airports and Airway Development Act.*** The Federal Airport Act was initially enacted in 1946. In 1970, the Federal Airport Act was superseded by the Federal Airports and Airway Development Act. Under both acts, the United States government was authorized to convey to a public agency any lands owned or controlled by the United States whenever it was deemed necessary for carrying out a project for the development or for the operation of a public airport.

The United States, citing as authority the Federal Airport Act and the Federal Airports and Airway Development Act, conveyed to the State of Hawaii after August 21, 1964, 779.3492 acres of land for the development of the Honolulu

International Airport. All were conveyed at no cost to the State. Of the total, 138.6977 acres (parcels 2–A, 2–B, 2–C, and 5–D) consisted of federal fee simple lands––that is, lands acquired by the federal government from private persons by way of cash purchase, condemnation, gift, or otherwise.[1] The remaining 640.6515 acres were ceded lands which were "deeded" over to the United States by the Territory of Hawaii shortly before statehood. Six parcels (parcels 6–B, 7–A–1, 7–B–1–A, 7–B–1–B, 7–B–3, and 7–C–2), consisting of approximately 515.0 acres were "deeded" to the United States on July 30, 1959. Four parcels (parcels 6–A, 7–B–2, 7–C–1–A, and 7–C–1–B), having an aggregate of approximately 125.0 acres were "deeded" on August 20, 1959 (one day before statehood). The entire 640.6515 acres (together with other lands conveyed by the deeds) were ostensibly "deeded" over to the United States in exchange for U.S. fee simple lands. The exchange was authorized by Public Law 85–534, July 18, 1958. (The exchange is hereafter referred to in this report as the 1959 land exchange.)

Although the documents transferring the fee title to the 640.6515 acres of land to Hawaii recited as authority for the transfer the Federal Airport Act and the Federal Airports and Airway Development Act, 489.5965 acres should be treated as having been returned to Hawaii under Public Law 88–233, and 151.055 acres should be treated as receipt of U.S. fee simple land. The 489.5965 acres include five of the six parcels mentioned above as having been included in the deed of July 30, 1959,

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1. Seventeen acres of the 138.6977 acres were initially ceded lands conveyed by the Territory of Hawaii under authority of section 91 of the Organic Act to Samuel M. Damon in a land exchange. These 17.00 acres were then subsequently acquired by the United States by way of condemnation.

and all of the four parcels mentioned above as having been included in the deed of August 20, 1959.

Both the deeds of July 30, 1959, and August 20, 1959, quitclaimed to the United States all "right, title, and interest" of the Territory of Hawaii in and to the parcels described in the deeds. As to the five parcels in the deed of July 30, 1959, the deed conveyed nothing to the United States. On the date of the deed, both the legal title and the equitable title to the parcels were in the United States. The United States acquired the legal title to the parcels on annexation, and it acquired the equitable title on August 22, 1957, when by Governor's Executive Order No. 1801, the parcels (which were then under the possession, use, and control of the Territory of Hawaii) were set aside for the use of the United States. On statehood, the parcels remained the property of the United States under section 5(c) of the Admission Act.

As to the four parcels in the deed of August 20, 1959, on the date of the deed the United States had legal title to the parcels, having acquired it on annexation, and the Territory of Hawaii had the equitable right to possess, use, and control the parcels. The deed conveyed all of the equitable right of the Territory to the United States. In effect, the deed operated to set the parcels aside for the use of the United States. On statehood, the United States continued to hold the parcels under section 5(c) of the Admission Act.

As section 5(c) lands, all five parcels of the deed of July 30, 1959, and all four parcels of the deed of August 20, 1959, were after August 21, 1964, returnable to Hawaii under Public Law 88–233. They were returnable without cost to the State, except for improvements placed on them by the United States. Thus, all of these parcels are classified in the chain of title report as Public Law 88–233 lands,

although the deeds conveying title to Hawaii cited the Federal Airport Act and the Federal Airports and Airway Development Act.

The 151.055 acres that should be treated as receipt of U.S. fee simple land consist solely of parcel 7–A–1. The parcel was included in the exchange deed of July 30, 1959. However, unlike the other parcels in the deed, parcel 7–A–1 was, on the date of the deed, legally owned by the Territory of Hawaii. Title to parcel 7–A–1, together with the title to all other lands owned by the Republic of Hawaii, vested in the United States on annexation. However, on April 12, 1950, by Presidential Executive Order No. 10121, the United States transferred the fee title to the parcel (together with the fee title to parcel 7–A–2) to the Territory of Hawaii. The parcel, later, was included in Governor's Executive Order No. 1801 and set aside for the use of the United States. The exchange deed of July 30, 1959, conveyed Hawaii's legal title back to the United States.

Since the deed of July 30, 1959, conveyed nothing to the United States with respect to all other properties included in the deed, and since the deed of August 20, 1959, operated only to set aside the parcels in the deed for the use of the United States, only parcel 7–A–1 was effectively exchanged for U.S. fee simple property in the 1959 land exchange. In the exchange, parcel 7–A–1 lost its ceded status. By law, property received in exchange assumed the status of the property given in exchange, and property given in exchange assumed the status of the property received in exchange. Thus, parcel 7–A–1 assumed the status of U.S. fee simple property, and the U.S. fee simple property received in exchange assumed the status of ceded lands. When parcel 7–A–1 was conveyed to Hawaii by the United States after statehood, it was received as U.S. fee simple property. Thus, it should, and it is, classified in the chain of title report as "other" property. The U.S. fee simple

property that Hawaii received in exchange in 1959 is included in parcel 1–A in the chain of title report.

4. ***Ineffective conveyances.*** By a deed dated November 29, 1976, the United States, citing as partial authority the Airport and Airway Development Act of 1970, conveyed to the State of Hawaii a number of parcels. Since this deed was executed sometime after Hawaii attained statehood and sometime after the five–year cutoff date provided in section 5(e) of the Admission Act for the return of public lands not needed by the United States, it would seem that on the face of the deed, none of the parcels enumerated therein could be considered to have been returned to Hawaii under any of the subsections of section 5 of the Admission Act. This conclusion, however, is not correct.

The deed of November 29, 1976, was an omnibus deed, which included parcels, title to which had vested in Hawaii some time before 1976. Title to parcels 3 and 4, for instance, had passed to Hawaii during the territorial period. These parcels were privately–owned lands acquired by the Territory of Hawaii by condemnation. The State of Hawaii, therefore, became the fee owner of these parcels under section 5(a) of the Admission Act.

Parcels 6–C, 7–B–4, 7–C–3, 7–C–4, 8–A, 9–A, and 11 were owned by the Republic of Hawaii and title to these parcels vested in the United States on annexation. However, since these parcels were never set aside during the territorial period for the use of the United States, title to them vested in the State of Hawaii on statehood pursuant to section 5(b) of the Admission Act.

Parcels 6–A, 7–C–1–A, 8–B, 9–B, and 9–C had previously been conveyed by the United States to the State of Hawaii. Parcels 8–B and 9–B had been so conveyed in 1963 and hence title to these parcels vested in the State of Hawaii pursuant to

section 5(e) of the Admission Act. As to parcel 9C, a deed dated July 23, 1965, cited Public Law 88-233 as authority for the conveyance to the State of Hawaii. Parcels 6-A and 7-C-1-A had been conveyed to the State of Hawaii by a prior deed dated May 3, 1971.

As to the above enumerated parcels, the deed dated November 29, 1976, conveyed nothing to Hawaii. Their status, with reference to the public land trust, was determined by the nature of their earlier conveyances to Hawaii.

5. *Parcels 2-D and 7-B-1-C.* The State has negotiated to purchase from the federal government a portion of parcel 2-D and a portion of parcel 7-B-1-C for $2.6 million. A down payment has already been made. These two parcels, we noted earlier, are within the outer boundaries of the Honolulu International Airport, but are owned by the federal government. (See sheet nos. 4 and 5.) The portions of parcels 2-D and 7-B-1-C that are being bought by the State total 3.240 acres. The parcels are being bought for airport purposes, and negotiations on the part of the State have been conducted by the DOT.

Parcel 2-D is U.S. fee simple land, the United States having acquired it from a private party in 1911. Parcel 2-D was acquired by the United States at the same time it acquired parcels 2-A, 2-B, and 2-C. However, unlike parcels 2-A, 2-B, and 2-C, parcel 2-D was never conveyed by the United States to Hawaii either before or after statehood. Parcel 2-D being U.S. fee simple land, there is no question that Hawaii must pay a consideration to secure any portion of it.

Parcel 7-B-1-C is ceded land. At annexation, it was a part of the Moanalua fishery. Legal title to it was ceded to the United States upon annexation, although the Territory of Hawaii retained the possession, use, and control of it. On August 22, 1957, by Governor's Executive Order No. 1801, parcel 7-B-1-C (together

with parcels 6-B, 7-A-1, 7-B-1-A, 7-B-1-B, 7-B-3, and 7-C-2) was set aside for the use of the United States.

Parcel 7-B-1-C was subsequently included in the 1959 land exchange discussed above. It was, on July 30, 1959, (together with parcels 6-B, 7-A-1, 7-B-1-A, 7-B-1-B, 7-B-3, and 7-C-2) "deeded" over to the United States by the Territory of Hawaii. However, as in the case of the other parcels included in the deed, the Territory of Hawaii had neither legal nor equitable interest in parcel 7-B-1-C on the date of the deed. Both the legal and equitable titles were in the United States. Thus, the deed of July 30, 1959, effectively conveyed no Hawaii interest in parcel 7-B-1-C. It remained on that date, property set aside for use by the United States. On statehood, the parcel continued to be held by the United States under section 5(c) of the Admission Act.

Since statehood, all of the parcels included in the exchange deeds of July 30, 1959, and August 20, 1959, have been returned to Hawaii, except parcel 7-B-1-C. As section 5(c) land, parcel 7-B-1-C, or any portion of it, is now returnable to Hawaii, if it is to be returned at all, under Public Law 88-233. It is returnable without monetary consideration, except that the State may be required to pay "the estimated fair market value of any buildings, structures, and other improvements erected and made" on the parcel by the United States. We are informed that a portion of the $2.6 million purchase price includes payment for parcel 7-B-1-C. We do not think that Hawaii is legally required to make such payment.

Our conclusion is at odds with the memorandum opinion issued by the state Attorney General on September 9, 1986. In that opinion, the Attorney General ruled that parcel 7-B-1-C lost its ceded status under the exchange deed of July 30, 1959,

that the parcels acquired by Hawaii from the United States in exchange became ceded land, and that Hawaii legally should pay for any portion of parcel 7–B–1–C.

We do not believe that the Attorney General, in rendering his opinion, had the benefit of a title search of parcel 7–B–1–C and of the other parcels involved in the 1959 land exchange. As discussed above, our search shows that only parcel 7–A–1 (included in the deed of July 30, 1959) lost its ceded status and that the only real exchange that took place was parcel 7–A–1 for two U.S. fee simple lots.

Figure 5.1 presents, in a pictorial fashion, the status of parcels 7–A–1 and 7–B–1–C just before the exchange deed of July 30, 1959. Outlined in blue in Figure 5.1 are the parcels (parcels 7–A–1 and 7–A–2), the legal title to which was conveyed by the United States to the Territory of Hawaii on April 12, 1950, by Presidential Executive Order No. 10121. Outlined in pink are the parcels that were set aside for the use of the United States by Governor's Executive Order No. 1801, dated August 22, 1957. Figure 5.1 clearly reveals that just before the exchange deed of July 30, 1959, the United States had the use of parcel 7–A–1 but the Territory of Hawaii possessed the legal title to the parcel, and that the United States had both the legal title and the equitable title to parcel 7–B–1–C. Thus, the exchange deed of July 30, 1959, while it conveyed the legal title to 7–A–1 to the United States, conveyed nothing with respect to parcel 7–B–1–C and did not alter the status of parcel 7–B–1–C as land set aside for the use of the United States.

We note here that all of the parcels included in the deeds of July 30, 1959, and August 20, 1959, that were returned to Hawaii since statehood were returned without cost to the State. Even parcel 7–A–1, although technically it became U.S. fee simple land on the exchange, was returned to the State without cost. The deeds

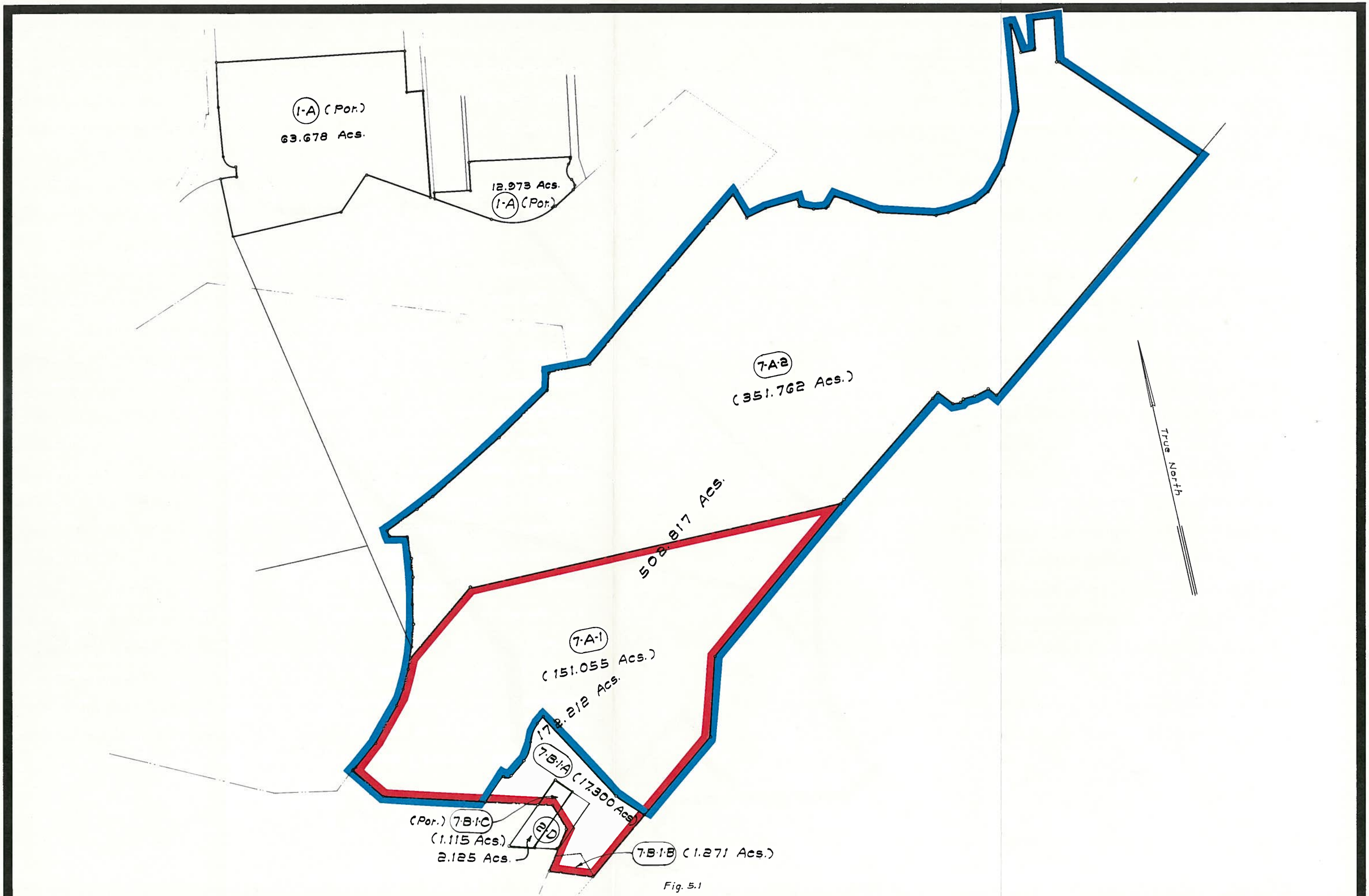
1-A (Por.)
63.678 Acs.
12.973 Acs.
1-A (Por.)
7-A-2
(351.762 Acs.)
True North
508.817 Acs.
7-A-1
(151.055 Acs.)
8.212 Acs.
17
7-B-1-A (17.300 Acs.)
(Por.) 7-B-1-C
(1.115 Acs.)
2.125 Acs.
20
7-B-1-B (1.271 Acs.)

Fig. 5.1

which quitclaimed the parcels to the State recited as authority for the transfer the Federal Airport Act and the Federal Airports and Airway Development Act. However, we concluded above that considering the character of the 1959 land exchange, all of the parcels, except parcel 7–A–1, should be treated as having been returned to the State under Public Law 88–233, and parcel 7–A–1 should be treated as "other" land.

General Lyman Field

The maps. The maps for General Lyman Field are in appendix B. Sheet no. 1 shows the parcels of land that were, at annexation, within the present boundaries of the airport. At annexation, three parcels comprised General Lyman Field as we know it today. Parcels 1 and 3 were crown lands, and parcel 2 was owned by the Bernice Pauahi Bishop Estate.

Sheet nos. 2 and 3 show how the parcels were subdivided into smaller parcels during the period between annexation and statehood. The chain of title explanation attached to the maps details the transactions that were had with respect to each sub–parcel during the territorial period.

The Hawaiian Homes Commission Act of 1920, designated eight sub–parcels of parcel 1 and one sub–parcel of Parcel 3 as "available lands" for the purposes of the Act. The sub–parcels so designated are set forth in sheet no. 3. Four of the eight sub–parcels of parcel 1 (parcels 1–H–4, 1–H–5, 1–H–6, and 1–H–7) were by the Act of May 31, 1944 (P.L. 78–320, c. 216, section 2, 58 Stat. 260) subsequently withdrawn as available lands and restored to their previous status as lands under the control of the Territory of Hawaii. One sub–parcel of parcel 1 (parcel 1–H–8) and the sub–parcel of parcel 3 (parcel 3–B) were conveyed by the Hawaiian Homes

Commission to the State in 1962, in exchange for other state land of equal acreage. This exchange was approved by the United States Secretary of the Interior and authorized by section 204(4) of the Hawaiian Homes Commission Act as amended by the Act of June 18, 1954, P.L. 83-415, c. 319, section 1, 68 Stat. 262.

Sheet no. 4 notes the Governor's executive orders that set aside the parcels and sub-parcels for airport use. Sheet no. 5 sets forth our conclusions as to the lands that are a part of the public land trust under section 5(f) of the Admission Act.

The acreages and classification of lands. The General Lyman Field is the State's fourth largest airport in terms of acreage. There are 1,339.6 acres within its boundaries. About 90 per cent or 1,207.2 acres are Admission Act section 5(b) lands and are, thus, subject to the Act's public land trust. Included in the 1,207.2 acres are parcels 1-H-8 and 3-B. These two parcels were, as noted above, formerly Hawaiian Homes Commission lands which were conveyed to the State by the Commission in 1962 in exchange for other state lands. Section 204(4) of the Hawaiian Homes Commission Act (as amended by the Act of June 18, 1954) provides that any land conveyed to the State by the Hawaiian Homes Commission in exchange for other state lands "shall assume the status of the land for which it was exchanged." Since the lands conveyed to the Hawaiian Homes Commission in the exchange were Admission Act section 5(b) lands, parcels 1-H-8 and 3-B assumed the status of section 5(b) lands.

Of the remaining 132.4 acres, 91.6 acres are technically Admission Act section 5(b) lands but are lands that were and still are designated as "available lands" under the Hawaiian Home Commission Act of 1920; 40.8 acres are lands acquired after statehood by condemnation from the Bernice Pauahi Bishop Estate and are thus not subject to the public land trust.

Some observations.

1. ***Railway lands.*** During the territorial period, Hawaii conveyed parcels 1–D, 1–J, and 1–K and rights–of–way over them to the Hilo Railroad Company (see sheet no. 2). Parcel 1–D was conveyed by a grant dated November 11, 1903. Parcels 1–J and 1–K were conveyed by a grant dated May 22, 1912. The grants provided that in the event the grantee permanently discontinued use of the parcels for railroad purposes, the parcels "shall revert to and again become the property of the Territory of Hawaii, or such body politic as hereafter may become its successor in interest." The use of the parcels for railroad purposes permanently discontinued in the 1940s. The records show that upon such discontinuance, parcels 1–D and 1–J were conveyed back to the Territory of Hawaii, but the records are bare of any document reconveying parcel 1–K to Hawaii. However, in light of the language of the grant of parcel 1–K, we have treated the title to the parcel as having automatically reverted to Hawaii by the grant's own terms.

2. ***Hawaiian Homes lands.*** The 91.6 acres that are still designated as available lands under the Hawaiian Homes Commission Act consist of parcels 1–H–1, 1–H–2, and 1–H–3 (see sheet nos. 3, 4, and 5). These parcels have been the subject of controversy between and among the Office of Hawaiian Affairs, the state Department of Transportation, the state Department of Land and Natural Resources, and the Hawaiian Homes Commission.

The three parcels came to be used for airport purposes under Hawaiian Homes Commission Resolution No. 120, adopted on October 6, 1952. That resolution recited that the lands were not then being leased as authorized by the provisions of the Hawaiian Homes Commission Act and that good cause appeared for the return of the lands to the control of the then Commissioner of Public Lands for use as an

addition to the then Hilo Airport (now General Lyman Field).[2] Later in 1958, by Governor's Executive Order No. 1841, the parcels were set aside to the Department of Transportation for runway extension at General Lyman Field.

Resolution No. 120 cited as authority for the transfer sections 204 and 212 of the Hawaiian Homes Commission Act. Section 204(2) provides that any available land not immediately needed for the purposes of the Act may be returned to the Commissioner of Public Lands (now Board of Land and Natural Resources) and "may be leased by the Commissioner or retained for management by the Commissioner." Section 212 provides that any such returned land shall resume the status of public land, except that it "may be disposed of under a general lease only." Both sections provide that any lease by the Commissioner of Public Lands must contain a withdrawal clause and lands so leased must be withdrawn by the Commissioner of Public Lands when needed for the purposes of the Hawaiian Homes Commission Act.

In 1975, the state Attorney General ruled in two separate opinions that under sections 204 and 212 of the Hawaiian Homes Commission Act, available lands temporarily returned to the Commissioner of Public Lands (Board of Land and Natural Resources) could only be disposed of by revocable leases and could not be set aside by executive orders.[3] Executive Order No. 1841 was, thus, invalid and of no effect, and the use of parcels 1-H-1, 1-H-2, and 1-H-3 for airport purposes was illegal.

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2. Earlier on March 16, 1933, by Hawaiian Homes Commission Resolution No. 56, parcel 1-H-3 (20.54 acres) had been transferred to the Commissioner of Public Lands for airport use. That resolution was later cancelled, and parcel 1-H-3 was subsequently again transferred to the Commissioner of Public Lands by Resolution No. 120, this time in combination with parcels 1-H-1 and 1-H-2.

3. Attorney General's Opinion 75-3, dated March 1, 1975; Attorney General's Memorandum Opinion, dated June 20, 1975.

The Attorney General's opinions prompted the Department of Hawaiian Home Lands (DHHL) to demand that the DOT pay rent, including back rent, for the use of the parcels at General Lyman Field, as well as for the use of available lands at the Kamuela Airport (40.7 acres) and at the Molokai Airport (72.5 acres)[4] which had also been returned to the Commissioner of Public Lands under various Hawaiian Homes Commission's resolutions and set aside for airport purposes by Governor's executive orders. The DHHL subsequently filed a suit in 1975 for such rent. In August 1980, the court confirmed that the lands were being used illegally by the State for airport purposes, and in March 1981, ruled that the DHHL was entitled to compensation for the use of the available lands at General Lyman Field for airport purposes.

Shortly thereafter, the DHHL and the DOT entered into an interim agreement. Under this agreement, dated April 6, 1981, the DOT agreed to pay to the DHHL $36,000 per month as rental for the use of the three parcels at General Lyman Field, pending resolution of the problems at all three airports.

The DHHL's suit to collect rent caused concern among the airlines utilizing General Lyman Field, the Kamuela Airport, and the Molokai Airport. The landing fees charged at these airports are based in part on the costs of operating the airfields, and rental or compensation paid by the State's airport system for the use of the available lands would be a part of the operating costs. The airlines filed a suit of their own in 1977 for a ruling as to whether they should be held responsible for the compensation payments that the DOT might be required to make to DHHL.

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4. See infra for a discussion of the lands at the Molokai Airport.

The airlines contended that they should not be held responsible since the airlines were not involved in the original illegal transfers of the parcels.

The airlines' suit ended in a settlement agreement. Under the agreement made in July 1981, the airlines, among other things, agreed to the use by the State and the DOT of $4.5 million in federal airport development reimbursements in the airport special fund and $1.5 million of excess roll-over funds in the airport special fund in working out a settlement with the DHHL. In exchange for this agreement, the State and the DOT agreed to release and indemnify the airlines from any further participation in the controversy with the DHHL.

In September 1981, the DOT and the DHHL entered into a 30-year lease of the available lands at each of the three airports. Each lease was made retroactive to April 1, 1975. Under the lease of the lands at General Lyman Field the DOT agreed to pay an annual rental, during the first 10 years, of $481,422 and the sum of $401,185 in settlement of the DHHL's claim for rental for the period preceding April 1, 1975. For the lands at the Kamuela Airport, the DOT agreed to pay an annual rental, for the first 10 years, of $33,603.36 and the sum of $24,002.40 in settlement of DHHL's claims for rental for the period preceding April 1, 1975. For the Molokai Airport lands, the DOT agreed to pay an annual rental, for the first 10 years, of $16,191 and the sum of $11,565 in settlement of past rent claims. In each lease, the parties set the annual rental for each succeeding 10-year period at the higher of the rental being paid in the immediately preceding 10-year period and the fair market rental at the expiration of the preceding period.

The leases did not end the controversy. The payment of rental on a permanent basis was not entirely satisfactory to the State or to the airlines. Indeed, even as

the leases were being negotiated, the State and the DOT were exploring the possibility of a land exchange with the DHHL.

On November 30, 1984, an agreement was reached on a land exchange. Under the agreement, the DHHL agreed to convey to the State the available lands being used for airport purposes at General Lyman Field (91.6 acres), the Kamuela Airport (40.7 acres), and the Molokai Airport (72.5 acres).[5] These lands were appraised at $14,027,200 as of November 15, 1981, and valued at $17.36 million as of September 8, 1983. In exchange, the State through the DLNR agreed to transfer to the DHHL, title to 15 lots at the Shafter Flats Industrial Development Unit I and 5 lots at Shafter Flats Industrial Development Unit III, containing a total area of 13.8 acres. The Shafter Flats lots were appraised at $17.36 million as of September 8, 1983. The DOT agreed to return to the DLNR certain lands under the DOT control, no longer needed for airport purposes.

The parties further agreed that all of the DOT's interest in the $4.5 million federal airport development reimbursements and the $1.5 million excess roll-over funds in the airport special fund would be transferred to the DLNR and the DHHL. The Department of Budget and Finance, with the approval of the DHHL would continue to manage and invest the $6 million total in such a manner as to maximize the yield but consistent with reasonable safety of the principal. However, the income from the $6 million would be paid to the DHHL until the DHHL received the total sum of $3,726,120.57. The entire $6 million would then vest exclusively in the DLNR. The parties contemplated that it would take less than six years for the

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5. The 72.5 acres at the Molokai Airport include an aviation easement area of 37.492 acres, not within the boundaries of the airport.

DHHL to be paid the final installment of the total $3,726,120.57, based on an annual return of 10.84 per cent. The 30-year leases made by the DHHL to the DOT in September 1981 were contracted to terminate upon the conveyance of the lands involved in the exchange.

The agreement was approved by the Governor. However, the land swap has not taken place; the 30-year leases are in limbo; the DHHL continues to collect the $36,000 monthly rental under the April 16, 1981, interim agreement; and controversy continues on the use of the Hawaiian Homes lands for airport purposes. Under section 204 of the Hawaiian Homes Commission Act, the approval of the Secretary of the Interior, as well as of the Governor, is required in any exchange of available lands for other publicly owned lands of equal value. The trustees of the Office of Hawaiian Affairs have petitioned the Secretary to withhold his consent to the land exchange.

The OHA trustees have reason to object. The Shafter Flats lands were originally acquired by the Territory of Hawaii by condemnation and a quit-claim deed from the Samuel M. Damon Estate, but subsequent to their acquisition were set aside by gubernatorial executive order for the use of the federal government. The lands were returned to the State of Hawaii in 1963 under section 5(e) of the Admission Act. As section 5(e) lands, they are subject to the Admission Act section 5(f) trust. They are also subject to HRS chapter 10. Indeed, the Shafter Flats lands have been generating substantial income, and OHA has been receiving 20 per cent of it. If the land exchange is consummated, OHA will lose its income from the Shafter Flats lands. Under section 204 of the Hawaiian Homes Commission Act, in any exchange of available lands for other public lands, the other public lands assume the status of available lands and the available lands assume the status of the other lands

for which they are exchanged. Shafter Flats lands would thus become available lands, subject to the jurisdiction of the DHHL, and their income would not be available to OHA. Parcels 1-H-1, 1-H-2, and 1-H-3 at the airport would become section 5(e) lands and subject to the Admission Act section 5(f) trust but OHA's entitlement under chapter 10 to any income attributable to these parcels would be subject to the numerous legal disputes attendant any trust property that is a part of the State's airport system. (See our discussion in chapter 7.)

If the agreement is effectuated and parcels 1-H-1, 1-H-2, and 1-H-3, become a part of General Lyman Field, there would be 1,298.8 acres that would be subject to the public land trust under section 5(f) of the Admission Act and possibly to HRS chapter 10, and there would be 40.8 acres that would not be subject to the trust or to chapter 10.

Molokai Airport

The maps. In appendix C are the maps resulting from the boundary survey of the Molokai Airport and the chain of title to the lands encompassed within the airport. Sheet no. 1 shows the parcels of land that were, at annexation, within the present physical boundaries of the airport. As shown on sheet no. 1, the Molokai Airport consists basically of three parcels of land: parcel 1, 184.298 acres; parcel 2, 22.504 acres; and parcel 3, 0.009 acres. The total acreage is 206.811 acres.

All three parcels were designated as "available lands" by the Hawaiian Homes Commission Act of 1920. However, by various resolutions of the Hawaiian Homes Commission the parcels were all "returned" to the Commissioner of Public Lands of the Territory of Hawaii for airport purposes. Subsequently, by the Act of Congress of August 29, 1935, Public Law 74-397, 135.763 acres of parcel 1 and all of parcels 2

and 3 were withdrawn as available lands and restored to their previous status as lands under the control of the Territory of Hawaii. Then, by the Act of May 31, 1944, Public Law 78–320, an additional 13.527 acres of parcel 1 were withdrawn as available lands and restored to their previous status as lands controlled by the Territory of Hawaii. There are today 35.008 acres that are still designated as available lands for the purposes of the Hawaiian Homes Commission Act. As shown on sheet no. 2, these lands are parcels 1–C, 1–D, 1–E, 1–F, and 1–G. These parcels have never been withdrawn as available lands and these are the Molokai Airport parcels that are included among the lands the DHHL agreed to convey to the State in exchange for the parcels at Fort Shafter Flats.

Sheet no. 3 features parcels 1–A–2, 1–A–3, and 1–A–4. These three parcels were during the territorial period (after their withdrawal as available lands) set aside for the United States military purposes. Parcels 1–A–2 and 1–A–3 were returned to the possession, use, and control of the Territory of Hawaii at different times in 1941, and parcel 1–A–4 was returned to the Territory in 1952. All three were, after their return to the Territory of Hawaii, set aside at different times before statehood by the Governor's executive orders for the Molokai Airport purposes.

In addition to the parcels now encompassed within the boundaries of the Molokai Airport, the Hawaiian Homes Commission by various resolutions "returned" other neighboring lands to the Commissioner of Public Lands of the Territory of Hawaii for the purposes of the Molokai Airport. These lands (which are outside the present physical boundaries of the airport) are delineated on sheet no. 4. These lands are not now being used for airport purposes.

Sheet no. 5 notes the Governor's executive orders that set aside the airport lands for airport purposes. The sheet reflects that executive orders were issued for the Hawaiian Homes available lands (parcels 1-C, 1-D, 1-E, 1-F, and 1-G). These executive orders, however, are not shown in the chain of title report because, as explained in our discussion on the General Lyman Field, the orders are invalid and of no effect.

Sheet no. 6 sets forth our conclusions as to the lands that are a part of the public land trust under section 5(f) of the Admission Act.

The acreages and classification of lands. As shown on sheet no. 6, all of the lands within the boundaries of the airport are Admission Act section 5(b) lands. Once the Airport-Fort Shafter Flats land exchange between the DHHL and the State is effectuated, the Hawaiian Homes available lands (parcels 1-C, 1-D, 1-E, 1-F, and 1-G), will, as explained in our discussion on General Lyman Field, assume the status of Admission Act section 5(e) lands. As section 5(e) lands, these parcels, together with the rest of the lands at the Molokai Airport, will be subject to the Admission Act public land trust and possibly to chapter 10.

Chapter 6

INVENTORY: HARBORS

The statewide harbor system consists of two separate financial entities: commercial harbors and small boat harbors. Both are administered by the harbors division of the Department of Transportation.

There are nine commercial harbors, seven deep-draft and two medium or small-draft. They provide for the movement of most commercial cargo entering and leaving the State. The deep-draft harbors, in order of cargo volume are: Honolulu Harbor, Oahu; Kahului Harbor, Maui; Hilo Harbor, Hawaii; Nawiliwili Harbor, Kauai; Kawaihae Harbor, Hawaii; Port Allen, Kauai; and Barbers Point Harbor, Oahu. The two medium-draft harbors are: Kaunakakai, Molokai and Kewalo Basin, Oahu.

There are some 11 small boat harbors, located throughout the State. They provide recreational ocean-based boating and physical facilities to small boaters.

We selected two deep-draft harbors (Honolulu Harbor and Kahului Harbor) and one medium-draft harbor (Kewalo Basin) for in-depth examinations to ascertain the accuracy with which the lands encompassing these harbors are accounted for in the state inventory. We also examined a small portion of Keehi Lagoon in conjunction with our study of Honolulu Harbor.

No land survey was conducted of any of the harbors. However, we believe that the results of our examination are reasonably accurate. As in the case of the airports, the mapping here was done by the cadastral section of the highways division of the State Department of Transportation.

The examination of the State's harbor lands, particularly those at the Honolulu Harbor, was complex and time-consuming. Unlike the airports which are of relatively recent origin, harbors have developed over many years, extending well beyond annexation. Surface transportation was for a long time the only means of travel to and from and within the islands. Harbors developed over this long period by bits and pieces as need arose. There are, therefore, numerous land transactions associated with the development of Hawaii's harbor facilities. Tracing through these transactions and ascertaining the lands involved in the transactions required painstaking research and analysis.

Harbors, by nature, encompass submerged lands and the waters over them. An initial question we needed to decide was how far out to the sea the boundaries of the state harbors ought to be taken for the purposes of the inventory. Theoretically, the boundaries could be taken as far out as the territorial waters of the state extend.[1] However, we did not do so. The seaward boundaries shown on the accompanying maps are those which we think are reasonable for the purposes of the inventory. Any submerged land beyond the boundaries shown on the maps would in any event, be Admission Act section 5(b) lands subject to the public land trust.

Honolulu Harbor

The maps. Honolulu Harbor is by far the most important commercial harbor facility in the State. Appendix D contains the maps of Honolulu Harbor resulting

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1. Section 5(i) of the Admission Act makes the federal Submerged Lands Act of 1953 applicable to the State. The Submerged Lands Act of 1953 (P.L. 83-31, 67 Stat. 29) confirms titles to the states in the submerged lands off their coasts for a distance of three miles.

from our survey of the boundaries of the harbor. There are 13 sheets of maps for Honolulu Harbor.

Honolulu Harbor today consists of lands that were at annexation parts or all of 13 separate parcels of land. Sheet no. 1 shows these 13 parcels of land. Parcel 1 is common to both Honolulu Harbor and the Keehi Small Boat Harbor area. Only that portion of parcel 1 that is pertinent to Honolulu Harbor is shown on sheet nos. 1 to 13. (A smaller portion of parcel 1 (2.4 acres) is shown in appendix G on sheet nos. 1 to 6 relating to the Keehi Small Boat Harbor area.)

Parcels 1, 3, 5, and 13 constitute the bulk (85.5 per cent) of the harbor lands. These parcels were, at annexation and still are to a great extent submerged lands. They were at annexation parts of fishing grounds as established under the laws of King Kamehameha III.[2] They were known, respectively, as the Mokauea fishery; Kapalama fishery; Kaholaloa fishery; and Kaakakaukukui fishery. Sheet no. 2 reflects these fishing grounds.

In 1846, the Land Commission was established to adjudicate all private claims to landed property acquired before 1846.[3] Among the claims filed were those for the Mokauea, Kapalama, Kaholaloa, and Kaakakaukukui fisheries. Sheet no. 3 shows the Land Commission Awards and Royal Patents that were issued for the fisheries and for some other lands included within the present-day boundary of the Honolulu Harbor.

Sheet nos. 3 to 8 show the division and subdivisions of the original 13 parcels that occurred since annexation for the purpose of transferring title or transferring

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2. Laws of 1839, chapter 3, section 8.

3. See chapter 4, footnote 5.

the use, possession, and control of lands between and among private owners, the Territory of Hawaii, the State of Hawaii, and the federal government. Sheet no. 7 is a blow-up of the Aloha Tower area (parcel 12) and sheet no. 8 is a blow-up of the Fort Armstrong area (parcel 13).

Sheet nos. 9, 10, and 11 reflect our conclusions as to the parcels that are and those that are not subject to the Admission Act sections 5(f) public land trust. Those designated Admission Act sections 5(b) and 5(e) and Public Law 88-233 are trust lands, and those designated Admission Act section 5(a) and X are not trust lands. Sheet no. 10 displays our conclusions with respect to the lands around Aloha Tower and sheet no. 11 does the same for the lands around Fort Armstrong.

Sheet no. 12 presents a view of the parcels included within Honolulu Harbor in terms of their characteristics: submerged lands, awarded lands, filled lands, registered lands, etc. Sheet no. 13 shows the Governor's executive orders that set aside the parcels for harbor purposes.

Foreign trade zone. In January 1986 (after the maps for the Honolulu Harbor had been completed), 16.988 acres of Honolulu Harbor lands were by gubernatorial executive orders withdrawn from harbor use and from the jurisdiction of the Department of Transportation and set aside for foreign trade zone use under the control and management of the Department of Planning and Economic Development. The lands are in the Fort Armstrong area. A portion is at the foot of Punchbowl Street and a part alongside Keawe Street.

The parcels affected include (see sheet no. 11): (a) a portion of parcel 13-B-1-A, 1.675 acres; (b) all of parcels 13-B-4-B and 13-B-5-B, and portions of parcels 13-A-1-B, 13-A-1-F, 13-A-2-A, 13-A-4-B, 13-A-5, 13-B-2, 13-B-4-A, and 13-B-5-A-2, 6.226 acres; and (c) portions of parcels 13-A-3-B, 13-A-2-E-1,

13–A–3–A, and 13–D, 9.087 acres. All of the parcels in (a) and (b) are section 5(a) lands, not subject to the public land trust. The first three parcels enumerated in (c) are section 5(b) lands, subject to the public land trust, and the last parcel (13–D) is section 5(a) land.

The acreage and classification of lands. By our calculation, Honolulu Harbor has 714.5 acres of land (excluding those portions withdrawn and set aside for foreign trade zone purposes). Most of it is submerged. The acreages by title sources are noted in Table 6.1. Section 5(b), section 5(e) and Public Law 88–233 trust lands total 338.7 acres, including 1.2 acres of non–ceded lands.

Table 6.1

Honolulu Harbor
Ceded and Non-Ceded Acreages
by Legal Sources of Title

Legal Sources of Title	Acreage		Total Acreage
	Ceded	Non-Ceded	
5(a)	193.777	80.386	274.163
5(b)	163.937	--	163.937
5(e)	125.487	--	125.487
PL 88-233	48.070	1.162	49.232
X	65.540	36.173	101.713
TOTAL	596.811	117.721	714.532

There are 193.8 acres of ceded lands that are not a part of the public trust by virtue of the fact that title to them vested in the Territory of Hawaii before statehood. They are Admission Act section 5(a) lands.

Some observations.

1. ***Lack of Governor's executive orders.*** There are some 13 parcels for which we could find no gubernatorial executive orders setting aside the parcels to

the DOT for harbor purposes. These parcels are, nevertheless, being used for harbor purposes and are included within the boundary of Honolulu Harbor under the jurisdiction of the DOT. The parcels total 337.994 acres. They include 154.798 acres of ceded section 5(a) lands, 48.747 acres of non-ceded section 5(a) lands, 121.312 acres of ceded section 5(b) lands, and 13.137 acres of ceded 5(e) lands. Table 6.2 enumerates these parcels.

Table 6.2

Honolulu Harbor
Parcels Lacking GEO

Parcel	Acreage	Classification	Ceded/ Non-Ceded
1-B-1	44.363	5(b)	Ceded
1-B-3	13.107	5(e)	Ceded
1-B-4	0.030	5(e)	Ceded
3-B	48.513	5(a)	Non-Ceded
5-A-1-A-1	73.721	5(b)	Ceded
12-B-2-B	0.115	5(a)	Ceded
12-D-1	1.161	5(b)	Ceded
12-D-2	0.057	5(b)	Ceded
13-A-1-A-1-A	154.683	5(a)	Ceded
13-A-1-D-2	0.282	5(b)	Ceded
13-A-2-E-3	1.728	5(b)	Ceded
13-B-1-B	0.132	5(a)	Non-Ceded
13-B-3	0.102	5(a)	Non-Ceded
	337.994		

Anomalous situations have arisen because of the lack of executive orders on some of these parcels. For example, in parcel 3-B, a portion of several piers is under executive orders while the remainder is not. Yet, both portions are being utilized for harbor purposes. We recommend that executive orders be issued for all parcels that are not now under any such orders, if the parcels are to continue to be used for Honolulu Harbor purposes.

In this connection, we note that there are new executive orders in the making. Some of them consolidate within one executive order the lands previously set aside for Honolulu Harbor purposes by several executive orders. Others seek to provide executive orders where none currently exists. At the time of the preparation of this report for printing, these new executive orders had not yet been issued.

2. ***Presidential Proclamation No. 1556.*** Included in the 193.777 acres of section 5(a) ceded lands are 187.8 acres, the fee title to which the Territory of Hawaii acquired pursuant to Presidential Proclamation No. 1556, dated February 17, 1920. Presidential Proclamation No. 1556 was unusual in that it conveyed title to parcels by general description only. All other proclamations and Presidential executive orders that conveyed title to the Territory over lands that later became a part of Honolulu Harbor contained specific descriptions by metes and bounds. Presidential Proclamation No. 1556 read as follows:

> "I, WOODROW WILSON, President of the United States of America, by virtue of the power vested in me by section seven of the Act of Congress approved May twenty-seventh, nineteen hundred and ten (36 Stat., 443,447), do hereby transfer to the Territory of Hawaii the title to all such public property so ceded by the Republic of Hawaii and in the possession and use of said Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes: Provided, That this proclamation shall not affect the title to any such public property within the said Territory taken for the uses and purposes of the United States, unless such property has been or shall be restored to its previous status by direction of the President of the United States in accordance with said section seven of the Act approved May twenty-seventh, nineteen hundred and ten."

The statute, mentioned in the Proclamation (36 Stat. 443, 447) had amended section 91 of the Organic Act. As amended, section 91 provided that the public property ceded to the United States by the Republic of Hawaii should remain in the

possession, use, and control of the Territory of Hawaii and maintained and managed by it until otherwise provided by Congress or taken for the uses and purposes of the United States by direction of the President or the Governor of Hawaii. It further provided that "title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes may be transferred to the Territory by direction of the President."

Proclamation No. 1556 purported to convey to the Territory the fee title to all ceded public lands which were then in the possession of the Territory for the purposes enumerated in section 91, without describing any of these lands in detail, by metes and bounds, or otherwise. Among the lands conveyed were those then being used by the Territory for wharves, landings, and harbor purposes. By reading the Proclamation above, we cannot tell which specific lands were conveyed by it. Presumably, at the time the Proclamation was issued, one could identify by visual inspection, the specific lands that were then in the possession and use by the Territory for harbor (and other public) purposes. The difficulty, however, is that we could find no inventory that was compiled upon the issuance of the Proclamation identifying the specific parcels that were conveyed by the Proclamation. We were able to reach some conclusions as to what lands were being used for harbor purposes at the time of the Proclamation, and thus included in the conveyance, by examining documents and maps pertinent to the time of the Proclamation. These parcels are generally where pier 2 and piers 5 to 15 are situated today.

Questions have been raised as to the validity of the Proclamation to convey title to the Territory of Hawaii because of the lack of specific descriptions of the lands involved. We considered this issue and concluded that the Proclamation validly conveyed title to the 187.8 acres of harbor lands. If the Proclamation is deemed ineffective as a legal conveyance, the 187.8 acres would be Admission Act section 5(b) lands, subject to the trust of section 5(f).

The general rule is that for an instrument to be operative as a legal conveyance, the land intended to be conveyed must be described with sufficient definitions and certainty to locate and distinguish it from other lands of the same kind.[4] However, courts have been very liberal in construing descriptions of parcels conveyed. If a description, seemingly uncertain, can be made certain, the court will validate the conveyance. Extrinsic facts pointed out in the description may be resorted to in order to ascertain the land conveyed, and if a surveyor or engineer can with the aid of extrinsic evidence locate the land and establish its boundaries, the description is sufficient. Thus, descriptions as "all of the grantor's property" in a certain locality, "land formerly owned by [a named person]," "land occupied by the grantor" and "land occupied by a [named person]" have at various times been upheld as valid. It would appear that the lands mentioned in the Proclamation could by visual inspection of the uses being made at the time of the Proclamation of the lands in the possession by the Territory be sufficiently identified.

3. ***Fisheries.*** Earlier we noted that parcels 1, 3, 5, and 13 in their original state were fisheries to which land commission awards were issued to private

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4. 23 Am Jur 2d, *Deeds,* section 48.

persons. The awards purported to convey the fee title to the lands beneath the fisheries. However, as discussed in that section of this report relating to Sand Island, the Republic of Hawaii and, later, the Territory of Hawaii, took strong exceptions to the power of the Land Commission to grant title to submerged lands. For parcels 1, 5, and 13, the controversy ended in compromises and settlements. The chain of title report for Honolulu Harbor reflects these compromises and settlements. Under the compromises and settlements, all of parcel 1 included within the boundaries of Honolulu Harbor were quitclaimed to the Territory of Hawaii; all of parcel 5, except parcel 5–B–1 was quitclaimed to the United States government during the territorial period; and title to parcel 5–B–1 was vested in William Sumner. Parcel 5–B–1 was later acquired by the State of Hawaii. Title to most of parcel 13 was acknowledged in the Republic of Hawaii under the compromises and settlements. The remainder of parcel 13 was quitclaimed by the Republic of Hawaii to the trustees of Bernice Pauahi Bishop Estate who later deeded the remainder to Hawaii.

With respect to all of parcel 3 (3–A, 3–B, and 3–C) there appears to have been no compromise or settlement, but in 1925, the trustees of Bernice Pauahi Bishop Estate quitclaimed the whole of parcel 3 (plus additional adjoining acreages) to the Territory of Hawaii for $15,000. Notwithstanding the assertion of title by the trustees of Bernice Pauahi Bishop Estate, the Territory and the United States government considered parcel 3 as ceded lands. Accordingly, a Presidential proclamation was issued in 1929 to vest title to parcel 3 in the Territory of Hawaii.

4. ***Presidential Executive Order No. 10833.*** Parcels 5–A–1–B and 5–A–2–A are classified as Public Law 88–233 lands. The chain of title report shows that Hawaii acquired title to these parcels through Presidential Executive Order

No. 10833 on August 20, 1959, one day before statehood. Presidential Executive Order No. 10833 is the same Presidential Executive Order that transferred title to 202 acres of Sand Island to the Territory of Hawaii one day before statehood. That is to say, Parcels 5–A–1–B and 5–A–2–A are parts of the 202 acres. In our discussion of the 202–acre Sand Island site, we said that the conveyance of the acreage should be treated as having been conveyed under Public Law 88–233, even though title vested in the Territory of Hawaii one day before statehood. The reader is directed to our discussion on Sand Island for our rationale.

Kahului Harbor

The maps. In appendix E are the maps for Kahului Harbor. On sheet no. 1 are shown the configurations at annexation of the five major parcels of land that today make up Kahului Harbor. As noted there, parcels 1, 2, and 3, which constitute most of the harbor, are submerged lands. Parcels 2 and 3 were sea fisheries. Sheet nos. 2 and 3 reflect the divisions and subdivisions of the initial five parcels for purposes of conveyance and land title transactions. Sheet nos. 4 and 5 show the harbor lands by sources of Hawaii's title to the various parcels. Sheet nos. 4 and 5 are alternative displays and are discussed more fully below.

Sheet no. 6 shows the parcels by their characteristics: submerged land, filled land, awarded land, etc. Sheet no. 7 notes the Governor's executive orders that set the parcels aside for purposes of the Kahului Harbor.

The acreages and classification of land. By our calculation, Kahului Harbor consists of 411.6 acres of land. A considerable portion is submerged. Of the total 411.6 acres, 399.2 acres are Admission Act section 5(a) lands, 3.790 acres are Public Law 88-233 lands, and 8.596 acres are "X" lands or lands Hawaii acquired other

than through any subsection of section 5 of the Admission Act and Public Law 88-233. As such, only 3.790 acres at Kahului Harbor are subject to the public land trust of section 5(f) of the Admission Act. This situation is reflected in sheet no. 4 of the maps of Kahului Harbor.

Of the 399.2 acres of section 5(a) lands, 383.7 acres are lands which were once a part of the Wailuku fishery and the Owa fishery and title to which the Territory of Hawaii acquired from the United States via Presidential Proclamation No. 1556, dated February 17, 1920. In our discussion of Honolulu Harbor, we noted that questions were raised concerning the validity of Proclamation No. 1556 to confer title to lands to the Territory of Hawaii because of the general descriptions rather than specific metes and bounds descriptions of the lands intended to be conveyed. The Proclamation conveyed to the Territory title to "all such public property so ceded by the Territory of Hawaii and in the possession and use of said Territory for the purposes of . . . wharves, landings, [and] harbor improvements. . . ." We opined in our discussion of Honolulu Harbor that the Proclamation was valid since presumably at the time of the Proclamation what lands were being used for wharves, landings, and harbor improvements could easily be identified through visual inspections.

If the Proclamation were invalid, the 383.7 acres would be Admission Act section 5(b) lands and a part of the public land trust. Sheet no. 5 reflects this situation.

Table 6.3

Kahului Harbor
Ceded and Non-Ceded Acreages
by Legal Sources of Title

Legal Sources of Title	Acreage		Total Acreage
	Ceded	Non-Ceded	
5(a)	397.307	1.920	399.227
P.L. 88-233	3.790	---	3.790
X	---	8.596	8.596
TOTAL	401.097	10.516	411.613

Some observations.

1. ***Parcel 2-A-5-B.*** Parcel 2-A-5-B was conveyed by the United States to the State of Hawaii by a quitclaim deed, dated October 16, 1973. Hawaii paid a consideration of over $100,000 for the parcel. The parcel is ceded land, title to which was in the United States on statehood. Since it was returned to Hawaii more than five years after statehood, the parcel may properly be considered to have been returned to Hawaii under Public Law 88-233, even though the deed does not mention the public law. It appears that the payment by Hawaii of over $100,000 was for the improvements placed on the parcel by the United States government. Public Law 88-233 provides for payment by the State, upon the return of any public land after August 21, 1964, for any improvements erected or made upon the land by the United States while in its possession.

2. ***Parcels 4 and 5.*** Parcels 4 and 5 are noted in the chain of title report as having initially been in the hands of private parties and were not ceded lands at the time of annexation. A Land Commission Award had been issued for parcel 4,

and all of parcel 5 started as crown lands. At the time of annexation, by a deed, parcel 4 was in the hands of Samuel Parker, and by deed and grant, parcel 5 belonged to Claus Spreckles. During the territorial period and continuing into the period after statehood, Hawaii acquired title to parcel 4 and to most of parcel 5 from Alexander and Baldwin, Inc.

It is of interest to note that at the time of the conveyance of parcels 4 and 5 to Hawaii, those parcels had grown in size from what they originally were. The increase resulted from filling in portions of the Wailuku fishery adjoining parcels 4 and 5. It appears that the owners of parcels 4 and 5 received permission from governmental authorities to fill the fishery. Thus, at the time of conveyance to Hawaii, those portions of parcels 4 and 5 that were filled lands were technically ceded lands and belonged to Hawaii. The State, however, did not accept ownership to the filled portion, but rather compromised the situation and treated the filled lands as accreted lands. We do not know the extent of the fill.

Kewalo Basin

Kewalo Basin is a medium-draft commercial harbor. Fishing vessels as well as vessels used for excursions in and around the waters of Oahu berth here.

The maps. In appendix F are the maps for Kewalo Basin. The Basin consists of three major parcels of land. Sheet no. 1 shows these parcels as they were at annexation. They were, and they continue to be, essentially submerged lands upon which harbor improvements were constructed. Sheet nos. 2 and 3 reflect the divisions of the parcels into smaller parcels for purposes of conveyances since annexation. In addition, sheet no. 2 reflects that title to parcels 1-A and 1-B came

to Hawaii by way of a deed,[5] that parcels 2-A and 3 were subject to Public Law 85-677, and that title to parcel 2-B was acquired by Hawaii through Presidential Proclamation No. 1818. The reference to Public Law 85-677 is discussed below.

Sheet no. 3 presents our conclusions as to the trust status of the lands. All of the parcels fall within either Admission Act section 5(a) or Admission Act section 5(b). Sheet no. 4 shows that Kewalo Basin consists of partially filled but essentially submerged land. Sheet no. 5 displays the Governor's executive orders that set aside the parcels for the purposes of Kewalo Basin.

The acreages and classification of lands. Kewalo Basin contains 55.7 acres of land. Of this total, 44.9 acres are Admission Act section 5(b) lands and subject to the public land trust, and 10.8 acres are not.

Table 6.4

Kewalo Basin
Ceded and Non-Ceded Acreages
by Legal Sources of Title

Legal Sources of Title	Acreage		Total Acreage
	Ceded	Non-Ceded	
5(a)	2.812	7.995	10.807
5(b)	44.917	--	44.917
TOTAL	47.729	7.995	55.724

5. Deed from trustees of Bernice Pauahi Bishop Estate, dated November 3, 1919.

An observation. Parcels 2-A and 3 were the subject of Public Law 85-677, dated August 18, 1958. That public law granted the parcels public land status and placed them under the control of the Commissioner of Public Lands of the Territory of Hawaii. Evidently, a congressional act was deemed necessary to confer public land status to these parcels in light of the uncertainty of the title of the Republic of Hawaii at the time of annexation over the parcels. The parcels, as noted above, were parts of the Kukuluaeo fishery which appears to have been the subject of a Land Commission Award issued in 1848.[6]

Keehi Lagoon Area

At the time of our examination of the landholdings at Honolulu Harbor, the Ewa boundary of the harbor was somewhat obscure and appeared to extend into the Keehi Lagoon area. Thus, the initial survey and mapping of Honolulu Harbor included portions of the Lagoon. Sheet nos. 1 to 6 in appendix G were prepared in connection with the examination of the Honolulu Harbor lands.

During the course of our study of Honolulu Harbor, the Department of Transportation decided that the Ewa boundary of the harbor should terminate at the drawbridge crossing the second entrance channel to the harbor. Sheet nos. 1 to 6 were thus separated from the other sheets of maps relating to Honolulu Harbor, and the lands included in sheet nos. 1 to 6 are separately discussed here.

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6. See our discussion on rights to fisheries in that portion of chapter 4 concerning Sand Island.

The lands shown on sheet nos. 1 to 6 properly belong within the Keehi Small Boat Harbor. However, sheet nos. 1 to 6 do not in any way reflect the entire landholdings at the Keehi Small Boat Harbor.

The maps. As shown on sheet no. 1, at annexation a portion of the Keehi Lagoon area included parts of the Mokauea fishery (parcel 1), parts of the Kaliawa fishery (parcel 15), and a part of a fish pond (parcel 14). The Mokauea fishery is the same fishery, parts of which are included in Honolulu Harbor. On the Honolulu Harbor maps, those portions of the Mokauea fishery included within the harbor are designated as parcel 1. Sheet no. 1 reflects that at annexation, a land commission award had been issued for the Mokauea fishery and another for the fish pond.

Sheet no. 1 shows that two separated parcels of land were parts of the Mokauea fishery. Both are designated as parcel 1. In sheet no. 2, the two parcel 1 segments are redesignated as parcels 1–C–1 and 1–C–2. Sheet no. 3 reflects the division of parcel 15 into parcels 15–A and 15–B. Title to parcel 15–B vested in Hawaii upon attainment of statehood, and title to 15–A was quitclaimed to the State of Hawaii by the United States government in 1963.

Sheet no. 4 represents our conclusions on the trust status of the lands. Sheet no. 5 describes the character of the parcels: submerged and partially filled; and awarded lands. Sheet no. 6 enumerates the Governor's executive orders that set aside the lands for harbor use.

Acreages and classification of lands. We conclude that 44.7 acres of land in this area are Admission Act section 5(b) lands and 7.3 acres are Admission Act section 5(e) lands. As such the 52.0 acres are a part of the public land trust. The area also has 0.5 acre which was acquired by the Territory of Hawaii from private sources. This acreage is not a part of the public trust. See Table 6.5 for a summary.

Table 6.5

Keehi Lagoon Area
Ceded and Non-Ceded Acreages
by Legal Sources of Title

Legal Sources of Title	Acreage		Total
	Ceded	Non-Ceded	Acreage
5(a)	--	0.487	0.487
5(b)	44.740	--	44.740
5(e)	7.279	--	7.279
X	--	--	--
TOTAL	52.019	0.487	52.506

An observation: parcels 15-A and 15-B. For parcels 15-A and 15-B, there is an entry in the chain of title report which cites section 91 of the Organic Act. This entry is not meant to imply that the Territory received title to the parcels under Section 91 of the Organic Act. That entry is included only to inform the reader that Governor's Executive Order No. 1458 was legally issued while Hawaii was a territory, setting aside parcels 15-A and 15-B for harbor purposes, even without a transfer of title to Hawaii, because the Territory was then in possession and control of the parcels under the Organic Act.

Chapter 7

LEGAL ISSUES

In addition to the completion of the inventory, Act 121, Session Laws of Hawaii 1982, required us to study the legal issues arising from the public land trust provisions of the Admission Act, the state Constitution and the statutes. The issues center on the entitlement of the Office of Hawaiian Affairs to the revenues generated from the use of the lands included in the public land trust.

In this chapter we discuss these issues. We offer suggestions as to how some of these issues might be resolved. In some instances we express what we think ought to be the probable outcome, but such expressions are not intended as legal opinions and should not be so construed.

Overall Issue Summarized

The overall question is: to what revenues generated by the lands included in the public land trust are the provisions of HRS chapter 10, applicable. There are several subissues, each focusing on a much narrower aspect of the overall question.

The amount of income that the Office of Hawaiian Affairs is entitled to receive is greatly impacted by the issues. Up to June 30, 1986, OHA received $8.3 million from the public land trust. See Table 7.1. This sum represents 20 per cent of the rentals collected during the period June 16, 1980 to June 30, 1986 on account of general leases and permits. The general leases and permits include only those general leases and permits issued by the DLNR and covering only those lands, title to which vested in the State of Hawaii under sections 5(b) and 5(e) of the

Table 7.1

Revenue from Lands Conveyed under Sections 5(b)* and 5(e)
of the Admission Act and Payments Remitted to OHA
for the Period Ending June 30, 1986

Period	Quarter	Revenue from 5(b) and 5(e)		Amount Remitted to OHA	
FY 1980-81					
June 16, 1980 - March 1981**		6,512,129		1,302,426	
April - June	4th	1,257,546		251,509	
Total FY 1980-81			7,769,675		1,553,935
FY 1981-82					
July - September	1st	1,278,514		255,703	
October - December	2nd	1,205,623		241,125	
January - March	3rd	2,325,072		465,014	
April - June	4th	775,818		155,163	
Total FY 1981-82			5,585,027		1,117,005
FY 1982-83					
July - September	1st	1,831,087		366,217	
October - December	2nd	1,324,541		264,908	
January - March	3rd	2,413,745		482,749	
April - June	4th	1,330,815		266,163	
Total FY 1982-83			6,900,188		1,380,037
FY 1983-84					
July - September	1st	1,549,968		309,994	
October - December	2nd	1,595,626		319,125	
January - March	3rd	2,783,573		556,715	
April - June	4th	1,536,880		307,376	
Total FY 1983-84			7,466,047		1,493,210
FY 1984-85					
July - September	1st	1,477,871		295,574	
October - December	2nd	1,308,238		261,648	
January - March	3rd	2,808,748		561,750	
April - June	4th	1,249,314		249,863	
Total FY 1984-85			6,844,171		1,368,835
FY 1985-86					
July - September	1st	1,860,105		372,021	
October - December	2nd	1,809,163		361,833	
January - March	3rd	2,077,660		415,532	
April - June	4th	1,515,780		303,156	
Total FY 1985-86			7,262,708		1,452,542
GRAND TOTAL TO DATE			41,827,816		8,365,564

* Prior to an attorney general's opinion issued on June 24, 1982, revenues derived from submerged lands were not treated as income subject to HRS section 10-13.5. Based on the attorney general's opinion that submerged lands are ceded lands granted in section 5(b), the Department of Land and Natural Resources remitted $53,543 to the Office of Hawaiian Affairs in October 1982.

** Includes two weeks of the last quarter of FY 1979-80.

Admission Act. OHA has received no portion of any other revenues from public lands. The resolution of the issues we have identified have the potential of enabling OHA to receive portions of these other revenues.

The issues fall within two broad categories. The first set of issues concerns the trust res--that is, what is included within the trust to which chapter 10 applies. The second group of issues deals with the income of the trust--that is, to what income of the trust is chapter 10 applicable.

The Trust Res

What comprises the trust, of which income OHA is entitled to a share, is the subject of this section. It is helpful, at the outset, to review what the Admission Act says about the public land trust and to note what the Constitution and HRS chapter 10 say about OHA's entitlements.

The Admission Act provides in section 5(f) that "[t]he lands granted to the State of Hawaii by subsection (b) . . . and public lands . . . 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 [the] State as a public trust. . . ." Public Law 88-233, enacted by Congress in 1963, provides that "[a]ny lands, property improvements, and proceeds conveyed or paid to the State of Hawaii under [Public Law 88-233] shall be considered a part of public trust established by section 5(f) of [the Admission Act] . . ."

The state Constitution in article XII, section 6, empowers OHA "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. . . ."

Article XII, section 4, states that "[t]he 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 . . . shall be held by the State as a public trust for native Hawaiians and the general public."

Article XVI, section 7, of the state Constitution says that "[a]ny 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."

HRS section 10–13.5 provides that 20 per cent of all funds derived from the public land trust described in section 10–3 shall be expended by OHA. Section 10–3 defines public land trust as "all proceeds and income from the sale, lease, or other disposition of lands . . . conveyed to the State of Hawaii [under] section 5(b) . . . and . . . under section 5(e) [of the Admission Act]."

P.L. 88–233 lands. OHA's entitlement to 20 per cent of the revenues derived from certain lands returned to Hawaii under Admission Act section 5(b) and section 5(e) is conceded. However, the State has consistently denied the right of OHA to any part of the revenues derived from lands conveyed to the State pursuant to Public Law 88–233, even though Public Law 88–233 lands are included within the Admission Act section 5(f) trust. The State bases its denial on the fact that section 10–3 does not mention Public Law 88–233 lands, while it expressly enumerates sections 5(b) and 5(e) lands.

The DLNR has sought a legal opinion of the state Attorney General on the right of OHA to share in the revenues from Public Law 88–233 lands. As of this

writing, an opinion has not been issued. OHA strongly believes that it is entitled to share in the revenues from Public Law 88–233 lands. Upon review of the statute and the state Constitution, we support OHA's views.

HRS chapter 10 was enacted to implement the state constitutional provisions concerning OHA. Section 1 of Act 196, Session Laws of Hawaii 1979, (from which chapter 10 is derived) states that "[t]he purpose of this bill is to implement Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii. . . ." Clearly, article XII, sections 4, 5, and 6, encompass all Admission Act section 5(f) trust lands. Section 6 entrusts in OHA the management and administration of (among other things) the income and proceeds from a pro rata portion of the trust "referred to in section 4" of article XII. Section 4 mandates the State to hold as a public trust for native Hawaiians and the general public, the lands granted to the State "by section 5(b) of the Admission Act and pursuant to Article XVI, section 7, of the State Constitution." Article XVI, section 7 requires the State to comply with any trust provision which Congress imposes on Hawaii upon its admission as a state in respect to the lands conveyed to the State by the United States and the proceeds and income therefrom.

Clearly Congress has imposed on lands returned to the State under Public Law 88–233 the same trust that it has imposed on lands returned under sections 5(b) and 5(e) of the Admission Act. Thus, these lands are included within the trust mentioned in article XII, section 4, and OHA has management and administrative authority over the income and proceeds from a pro rata portion of the section 4 trust.

The inclusion of lands conveyed pursuant to Public Law 88–233 within section 10-3 finds further support in the fact that Public Law 88-233 in effect amended section 5(e) of the Admission Act, and section 10-3 expressly includes section 5(e)

lands. Under Public Law 88–233, all ceded and territorial lands retained by the United States are returnable to Hawaii at any time they are no longer needed by the United States, and, once returned, they are subject to the trust provisions of section 5(f).

The definition of "public land trust" contained in HRS section 10–3 is unfortunate. It is couched in terms of land transfers to the State rather than in terms of the trust created by section 5(f) of the Admission Act. However, since chapter 10 is intended to implement article XII, sections 4, 5, and 6 of the state Constitution, and all section 5(f) lands are clearly included within the ambit of sections 4, 5, and 6, and, further, since Public Law 88–233 amends section 5(e) of the Admission Act, section 10–13.5 should be read to apply to funds derived from lands conveyed to the State under Public Law 88–233 as well as to funds derived from lands conveyed to Hawaii under sections 5(b) and 5(e) of the Admission Act.

To remove any doubt about the applicability of section 10–13.5 to the lands conveyed to the State under Public Law 88–233, section 10–3 should be amended so that the "public land trust" as used in chapter 10 would apply to all lands included within the trust provided in section 5(f) of the Admission Act.

The impact of the inclusion of Public Law 88–233 lands within chapter 10 is significant. Sand Island is a case in point.

In chapter 4 of this report, we noted that 360 acres of land at Sand Island (244 landed and 116 submerged) were returned to Hawaii in 1963 pursuant to Public Law 88–233. We also noted that another 202 acres of land at Sand Island were returned to Hawaii one day before statehood, and we urged that the 202 acres be treated as if they had been returned pursuant to Public Law 88–233. The two parcels of land generate a sizeable amount of revenues.

Appended to chapter 4 are maps of Sand Island. Map A shows what lands are included in the 360 acres and what lands in the 202 acres. Map B shows how these lands are currently being utilized. As shown on the maps, portions of the 360 acres and portions of the 202 acres, totalling 144 acres, are being used as a container yard/marginal wharf and storage area under the jurisdiction of the DOT. In addition, 63 of the 202 acres returned to Hawaii one day before statehood are being leased out by the DLNR under revocable permits for light industrial uses. The remainder of Sand Island is non-revenue producing, except for a pipeline easement granted to the Union Oil Company of California.

The 20 per cent provision of HRS section 10-13.5 has not been applied to any of the revenues from these various uses. As shown on table 7.2, the revenues from these uses in fiscal year 1985-86 totaled $8.7 million. If the 202 acres had been treated the same as the 360 acres received by Hawaii from the United States pursuant to Public Law 88-233, and if the 20 per cent provision of section 10-13.5 had been applied to lands returned to Hawaii via Public Law 88-233, OHA might have been entitled to receive for 1986 alone in excess of $1.7 million (20 per cent of $8.7 million). If the 20 per cent provision had been applied each year to the revenues collected between November 1978 and June 30, 1986, OHA might have received more than $9 million (20 per cent of $45.8 million).

Admission Act section 5(a) lands. The Admission Act does not include in the section 5(f) public land trust those lands, title to which vested in Hawaii pursuant to section 5(a). Nevertheless, it has been urged that section 5(a) lands should also be considered as being a part of the public land trust and be subject to the 20 per cent provision of HRS chapter 10.

Table 7.2

Sand Island Revenue by Controlling Agency and Use

Controlling Agency/Use	FY 1978-79	FY 1979-80	FY 1980-81	FY 1981-82	FY 1982-83	FY 1983-84	FY 1984-85	FY 1985-86
Department of Land and Natural Resources								
Light Industrial (63 acres)	$ 240,000	$ 760,000	$ 800,000	$1,200,000	$1,800,000	$1,800,000	$1,800,000	$ 1,700,000
Union Oil Pipeline (.796 acres)	2,000	2,000	2,000	2,000	2,200	2,300	2,300	2,400
Recreational Area	-	-	24	33	120	-	-	-
	$ 242,000	$ 762,000	$ 802,024	$1,202,033	$1,802,320	$1,802,300	$1,802,300	$ 1,702,400
Department of Transportation Container Yard/Marginal Wharf Storage (144 acres)	$2,000,000	$1,900,000	$1,500,000	$4,400,000	$6,300,000	$6,300,000	$6,300,000	$ 7,000,000
	$2,000,000	$1,900,000	$1,500,000	$4,400,000	$6,300,000	$6,300,000	$6,300,000	$ 7,000,000
TOTAL	$2,242,000	$2,662,000	$2,302,024	$5,602,033	$8,102,320	$8,102,300	$8,102,300	$ 8,702,400
CUMULATIVE TOTAL (FY1978-79 - FY1985-86)								$45,817,377

The inclusion of section 5(a) lands within the public land trust has been urged in part because of situations such as the conveyance of 202 acres on Sand Island to Hawaii one day before statehood. By conveyance to Hawaii one day before statehood, the 202 acres became section 5(a) lands, not subject to the trust. Yet, had there not been at that time a sense of urgency to transfer the land to Hawaii while it was still a territory, the 202 acres might well have been conveyed to Hawaii under Public Law 88-233, together with the 244 landed acres of Sand Island that were later conveyed to Hawaii in 1963.

Section 5(a) lands generate a considerable amount of revenues. Subjecting them to the trust would increase OHA's entitlements.

There is historical support for making section 5(a) lands a part of the public land trust. Since annexation, all public lands have been considered as trust property to be used for the benefit of the inhabitants of Hawaii. The trust concept was initially embodied in the joint resolution of annexation of July 7, 1898. It was carried forward into the Organic Act and to the public land laws of Hawaii (HRS chapter 171).

The inclusion of section 5(a) lands in the public land trust also eases the administration of the trust. We suggested once before, in connection with our audit of the DLNR,[1] that all public lands be considered a part of the public land trust. We noted then that the inability to distinguish between ceded and non-ceded lands was causing confusion in accounting for the revenues of the public trust lands. We continue to endorse the position that all public lands be considered a part of the

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1. Legislative Auditor, *Financial Audit of the Department of Land and Natural Resources,* Audit Report No. 79-1, January 1979.

public land trust. Treating all public lands as trust lands under section 5(f) of the Admission Act would mitigate the need for an accurate inventory (which requires costly surveys and title searches) to distinguish between trust lands and non-trust lands, and between lands subject to chapter 10 and lands not subject to chapter 10.

Income from use of trust lands. On September 23, 1983, the state Attorney General issued an opinion addressed to the director of the state Department of Transportation that transfers of public lands to governmental agencies for public uses are not "dispositions" of public lands, and therefore, the proceeds or income derived from such uses are not subject to HRS chapter 10. The issue to which the Attorney General was responding was whether revenues derived from the operation of the State's airports and harbors are subject to the 20 per cent provision of chapter 10. The airport and harbor lands have been set aside (transferred) to the state Department of Transportation by gubernatorial executive orders for airport and harbor purposes. By this opinion, the Attorney General ruled out the airport and harbor revenues from the reach of chapter 10.

The Attorney General's opinion was based on the language of the statute. Section 10-3 defines "public land trust" as "all proceeds and income from the sale, lease, or other disposition of lands" conveyed to the State under sections 5(b) and 5(e) of the Admission Act. This definition limits the trust to only the proceeds and income from *dispositions* of trust lands. This definition is narrower than that contained in section 5(f) of the Admission Act. Section 5(f) specifies not only the proceeds from the sale, lease or other disposition of the lands, but also the lands themselves and the income from the lands as being within the public land trust. Section 5(f)'s definition of "public land trust" is as follows:

> "lands granted to the State of Hawaii by [section 5(b) of the Admission Act] and public lands . . . conveyed to the State under [section 5(e)], together with the proceeds from the sale or other disposition of any such lands and the income therefrom . . ."

Although HRS section 10-3, appears to define public land trust more narrowly than the Admission Act, we doubt that the legislature intended to limit OHA's entitlement to only the income and proceeds from dispositions of trust lands. As stated in our discussion on the inclusion of Public Law 88-233 lands within the trust for purposes of chapter 10, the legislature enacted chapter 10 for the express purpose of implementing the state constitutional provisions relating to OHA. The constitutional provisions provide for OHA sharing in the trust established by the Admission Act.

If our analysis is correct and the public land trust, for purposes of chapter 10 includes more than the proceeds and income from the sale, lease, or other disposition of the lands, then the Attorney General's opinion is not dispositive of the issue of entitlement of OHA to 20 per cent of the airport and harbor revenues. The Admission Act trust includes income from the land, and such income is derived from the use to which the land is put. Thus, the query is to what income generated from the use of trust lands for airport and harbor purposes and for any other public purpose, is OHA entitled to share. We address that issue in the sections that follow.

As a footnote, we observe that under the Attorney General's opinion, it is possible for income from the use of public trust lands (a share of which income OHA might otherwise be legitimately entitled to) to be shielded from the claims of OHA by simply setting aside and transferring the lands to a governmental agency for such use.

The Trust Income

If the income from the use of lands is subject to the 20 per cent provision of HRS chapter 10 notwithstanding that the land had been set aside by gubernatorial executive order to a governmental agency, the meaning of "income" to which OHA may lay claim must be addressed. The income in which OHA is entitled to share poses a more difficult problem than the question of what constitutes the trust res. There are fewer guidelines here than in the case of the trust res to which reference might be made. For this reason, resolution of the income issue is less likely to be achieved without legislative intervention. Included among the questions here are whether revenues from government operations constitute "income," whether "income" means "net income" or "gross income," and whether any income is derived when both trust and non-trust lands in combination work to produce the income.

Uses of trust lands. Trust lands are put to a variety of uses. (a) Some are sold. Some are sold in their unimproved state; others are sold after development by government. An example of the latter is the Hawaii Housing Authority's program to develop and sell to the so-called "gap" group affordable residential property. (b) Some trust lands are leased. As in the case of sale, some lands are leased in their unimproved state; others are leased after they are developed and after improvements are put on them by government. (c) Some trust lands are used to house governmental offices from which no income is derived, except for some incidental income. Incidental income includes such income as receipts from the sale of publications and school lunches. (d) Others are used to operate governmental enterprises which do generate income. Harbors, airports, municipal golf courses, and public parking structures are examples. (e) Sometimes government develops public facilities on trust lands but contracts with the private sector to operate the

facilities. An example of this is the operation of municipal parking structures by APCOA, Inc., a private parking lot operator. (f) Often government allows privately operated concessions within governmental office buildings and government operated public facilities. Examples are blind vendor concessions in office buildings; food concessions at the Honolulu zoo; food, equipment, and cart concessions at municipal golf courses, and concessions at the airports. These usually involve spaces in buildings and facilities, and not any particular plot of land.

Obviously, when trust land is used simply to house governmental offices, with no income (except incidental income) being derived on account of the use of the land, chapter 10 is inoperable. It is also reasonably clear that when trust land is sold or leased out, the proceeds of sale or the lease rentals are income within the meaning of chapter 10. This is so, whether the land is sold or leased out in an improved or unimproved state; under the law of real property, all permanent improvements become a part of the land. It is not clear, however, whether revenues from public facilities on trust land, operated by government or by the private sector under contract with government, and revenues from private concessions within government-operated public facilities constitute "income" subject to chapter 10.

It has been suggested that where trust land is used for a public facility operated by government, the income derived from such use and the income derived from the concessions within such facility are not subject to chapter 10. The theory here is that the use by government of trust land for a public purpose is in itself an object of the trust. There is, however, nothing in the Admission Act or in the state statute that distinguishes between income derived from trust lands used for public purposes and income derived from trust lands used for private purposes. Thus, the rationale for exempting income derived from public facility operated by government

from chapter 10 must lie elsewhere. In the paragraphs that follow, we explore some of these other bases.

Gross versus net income. Both the Admission Act and HRS chapter 10 speak in terms of the "income" of the trust property; but neither the Admission Act nor chapter 10 is explicit as to whether "income" means "gross income" or "net income," and, if it means "net income," how the net is to be derived. There are important implications for OHA in the way "income" is defined.

The usual meaning given to the word "income" is net income, not gross income, in the absence of something showing a contrary intent.[2] Defining "income" as gross income could adversely affect important governmental programs.

Except where expressly established for the purpose of raising revenues for the State or county, a public enterprise is generally intended to be no more than self supporting. The revenues of the enterprise are expected to do no more than defray the cost of its operation and maintenance and the cost of making improvements to the facilities of the enterprise. Government strives to set fees at a level sufficient to enable the enterprise to break even. However, the fees set are often insufficient to cover costs, and many public enterprises are subsidized from the general fund of the State or the county.

If the 20 per cent provision of chapter 10 is applied to the gross income of these enterprises, the fees will need to be raised or additional subsidies will need to be made. We illustrate this point with the case of the County of Kauai Wailua golf course. We indicated in an earlier chapter that this golf course is probably on trust land. Table 7.3 shows the revenues and expenditures of the golf course for fiscal

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2. 51 Am. Jur. 2d. *Life Tenants and Remaindermen,* Section 105.

Table 7.3

County of Kauai
Wailua Golf Course
Effect of 100% and 20% Allocation of Revenues
Fiscal Years 1979 to 1985

	FY 1978-79	FY 1979-80	FY 1980-81	FY 1981-82	FY 1982-83	FY 1983-84	FY 1984-85
ACTUAL							
Revenues	$ 476,000	$ 429,000	$ 512,000	$ 458,000	$ 455,000	$ 534,000	$ 647,000
Expenditures	348,000	440,000	525,000	523,000	476,000	509,000	616,000
Excess	$ 128,000	$(11,000)	$(13,000)	$(65,000)	$(21,000)	$ 25,000	$ 31,000
Fund Balance	$ 264,000	$ 253,000	$ 240,000	$ 175,000	$ 154,000	$ 179,000	$ 210,000
100% ALLOCATION OF REVENUES*							
Revenues	$ 476,000	$ 429,000	$ 512,000	$ 458,000	$ 455,000	$ 534,000	$ 647,000
Less Allocation of Revenues	339,000	429,000	512,000	458,000	455,000	534,000	647,000
Net Revenues	137,000	-	-	-	-	-	-
Expenditures	348,000	440,000	525,000	523,000	476,000	509,000	616,000
Excess	$(211,000)	$(440,000)	$(525,000)	$(523,000)	$ 476,000)	$(509,000)	$(616,000)
Fund Balance	$(75,000)	$(515,000)	$(1,040,000)	$(1,563,000)	$(2,039,000)	$(2,548,000)	$(3,164,000)
20% ALLOCATION OF REVENUES*							
Revenues	$ 476,000	$ 429,000	$ 512,000	$ 458,000	$ 455,000	$ 534,000	$ 647,000
Less Allocation of Revenues	68,000	86,000	102,000	92,000	91,000	107,000	129,000
Net Revenues	408,000	343,000	410,000	366,000	364,000	427,000	518,000
Expenditures	348,000	440,000	525,000	523,000	476,000	509,000	616,000
Excess	$(60,000)	$(97,000)	$(115,000)	$(157,000)	$(112,000)	$(82,000)	$(98,000)
Fund Balance	$ 196,000	$ 99,000	$(16,000)	$(173,000)	$(285,000)	$(367,000)	$(465,000)

*From November 7, 1978.

Sources: County of Kauai, "Estimated Revenue Collections Ledger," Fiscal Year 1978-79 to 1981-82, County of Kauai,"Finance Director's Annual Report," Fiscal Year 1978-79 to 1984-85; and County of Kauai, Department of Finance.

years 1979 through 1985. For each year, there is displayed a calculation as to what might have happened to the golf course's ability to finance itself, if OHA were entitled to 20 per cent of the gross revenues.

Defining "income" as "gross income" also has implications on important governmental objectives. We illustrate this with the Hawaii Housing Authority's program to develop and to sell, lease or rent developed residential housing. This program is undertaken pursuant to Act 105, SLH 1970 (HRS chapter 359G). The object of the program is to make housing available at affordable prices to those in the "gap group" (those who earn insufficient amounts to qualify to buy housing generally offered on the open market). A dwelling unit revolving fund is used to develop into residential lots and to construct residences on state-owned lands (including lands subject to the public land trust). The completed residences, including the lots, are then sold, leased or rented at a price or rent based on cost. "Cost" includes the costs of development and construction of the residences, but any amount subsidized by the State, including the land, need not be counted as cost. All proceeds are deposited into the dwelling unit revolving fund for use in other projects.

So long as the price or rent can be kept at a level no greater than the cost of the program, the objective of the program can be met. However, if "income" is defined as "gross income," the price or rent would need to be raised to recover cost, thereby frustrating the objective of the program, or the State would need heavily to subsidize the program. As it is, the program rarely achieves break even operation. Over the years, thousands of homes have been made available for purchase under Act 105. Total program costs, including administrative expenses, have consistently exceeded revenues. Table 7.4 presents a financial summary of six major projects involving lands acquired from the DLNR that were started and completed since

Table 7.4

Selected Dwelling Unit Revolving Fund Housing Projects
Summary of Financial Results

	Kuliouou Valley	Ainaola House Lots III	Kealakehe House Lots	Kaumana House Lots	Puainako II	Kawailani	Total
Sales Dwelling Units	$19,171,000	$1,574,000	$3,135,000	$955,000	$2,802,000	$1,754,000	$29,391,000
Less Cost of Sales	17,773,000	1,548,000	3,112,000	955,000	2,801,000	1,719,000	27,908,000
Gross Profit	$ 1,398,000	$ 26,000	$ 23,000	$ -	$ 1,000	$ 35,000	$ 1,483,000
Gross Profit Percentage	7.3%	1.7%	0.7%	-	-	2.0%	5.0%

Source: Hawaii Housing Authority, finance section.

November 1978. As the table notes, each of the projects had a "gross profit" of less than 7.5 per cent. Combined, the projects had a gross profit of only 5.0 per cent. The gross profit figures are before deducting any administrative expenses. The figures, further, hardly include the cost or value of the lands.

There are possibly two situations under the Act 105 program where the income could be subject to chapter 10. One situation arises when the purchaser of the fee or leasehold is required to pay for the cost or value of the land. Although the HHA need not include the cost or value of the land in the sale of the residence to the initial purchaser, if the purchaser subsequently sells the residence to any person other than the HHA (and he is free to do so after 10 years of purchase), the Act requires the purchaser to reimburse HHA for the land. In such case, if the land is trust land, to the extent that the payment for the land exceeds all other subsidized amounts and costs not included on initial purchase, the amount received for the land constitutes proceeds subject to chapter 10. The HHA incurs no cost in the acquisition of trust lands for the program, and the proceeds of the disposition of any trust land are subject to chapter 10.

The other situation (although remote) where the income of the Act 105 program may be subject to chapter 10 is when the residence is rented out and the rental reflects a return on the land on which the residence sits. If the land is trust land, that portion of the rental attributable to the land is income subject to chapter 10.

Defining income as net income effectively shields the income of a public enterprise or program from the reach of chapter 10, provided the program is indeed not intended as revenue-raising. There would hardly ever be any net income to which the statute could apply. The situation is different, however, if a public

enterprise or program is intended as a revenue raising measure. In such a situation, a net income is expected, and if a net is realized, the income, at least to the extent that it is attributable to any trust land on which the enterprise or program is operated, is subject to chapter 10.

If income is net income, as it appears to be, an important question is, what may legitimately be deducted from gross income as cost or expense. For instance, may the cost of future improvements to physical facilities supporting a governmental program, whether planned or not, be deducted from income and set aside in a reserve fund. There are few guidelines in this area.

The above discussion on gross versus net income applies to income from public facilities contracted out to the private sector to operate (e.g., public parking facilities). To the extent that government realizes a profit, after deducting legitimate cost and expenses, and to the extent that such profit is attributable to any trust land on which the facilities lie, the income would appear to be subject to chapter 10.

Bond covenants. The issue of gross versus net income is of particular significance in the case of the State's airports and commercial harbors. The airports and commercial harbors of the State are constructed largely through the floating of revenue bonds. The income of the airports and harbors are pledged to secure these bonds. There are some $300 million in airport and harbor revenue bonds currently outstanding.

The bond covenants generally prescribe the order of priority in which payments are to be made out of the airport or harbor revenues. For instance, the original May 1, 1969, bond certificate which provided for the issuance of $40 million

of State of Hawaii airport system revenue bonds and all supplemental certificates issued for subsequent bond offerings have established the following order of priority:

(1) Payment of the principal and interest on bonds, including reserves for their payment.

(2) Payment of the costs of operation, maintenance and repair of the airport properties, including reserves for their payment, and the expenses of the operation of the state Department of Transportation in connection with the airport properties.

(3) Funding an "Airports System Major Maintenance, Renewal and Replacement Account," which is applied to making up deficiencies in the reserves to pay bond principal and interest and to making major maintenance, repairs, renewals and replacements (not annually recurring) at the airports, including major maintenance, repair, renewals and replacements of runways, taxiways and access roads.

(4) Reimbursement of the state general fund for all bond requirements for general obligation bonds issued for the airports.

(5) Providing for betterments and improvements at the airports.

(6) Providing for special reserve funds and other special funds as created by law.

(7) Payment for any other purpose connected with or pertaining to the bonds or the airports as authorized by law. The State, however, has specifically restricted any transfer to its general fund or the application to any other purposes of any part of the airport revenues, unless and until adequate provision has been made for the first through the sixth items.

The bond certificates also require some excess of revenues over cost. They provide that the airport system generate net revenues in an amount at least equal to 35 per cent of the revenue bond debt service requirements for the following fiscal year.

The bond certificates for the state's commercial harbors are similar to the airport bond certificates in the priority of payments out of the commercial harbor revenues. There, the certificates require that the harbor system generate net revenues in an amount at least equal to 50 per cent of the revenue bond debt service requirements for the following fiscal year.

The provisions of the bond certificates are to insure first, the prompt and full payment of the debt service of the revenue bonds, and second, the maintenance of a viable airport or harbor system with its revenue potentials unimpaired.

The application of the gross income approach to airport and harbor revenues raises a constitutional issue concerning the impairment of obligation of contracts. Indeed, even the net income approach, as that term is traditionally defined, raises the same constitutional issue. The airport and harbor systems can and do raise revenues in excess of the cost of construction, operation, maintenance and repair; but none of that excess can be reached by chapter 10 without raising the impairment of contract issue, unless and until all of the requirements of the bond covenants are met. It is possible, under the certificates, for the State to raise revenues in excess of the requirements specified in the certificates. To the extent that there is such an excess, and the excess is attributable to lands subject to chapter 10, OHA probably may legitimately claim a share of it. However, the stated policy of the State is to operate the airport and harbor systems on a self-sustaining basis by

producing only that amount of revenues which are required to pay all expenses of the systems, including bond requirements.

It is pertinent to note here that the term "revenues" for the purposes of the bond covenants includes the revenues from the concessions situated at the airports or harbors. Indeed, in the case of the Honolulu International Airport, the term includes revenues from the duty-free shop situated in Waikiki (outside the boundaries of the airport). Thus, the discussion above applies to these concession revenues.

Allocation issue. Some public facilities straddle trust as well as non-trust lands. The Honolulu International Airport (HIA) is an example. The airport comprises 4,422.5 acres, of which 3,426.1 acres are Admission Act section 5(f) trust lands. Two thousand seven hundred seventy four and one-half acres were returned to Hawaii under sections 5(b) and 5(e) of the Admission Act, and 651.7 acres under Public Law 88-233. For purposes of this discussion, we assume that lands returned under Public Law 88-233, as well as lands returned under sections 5(b) and 5(e) are subject to HRS chapter 10.

The question is, how are revenues generated from a public facility which sits on trust and non-trust lands to be accounted for between the trust and non-trust lands. The difficulty of the question is illustrated by the situation at the HIA.

As Table 7.5 shows the gross operating revenues at HIA during the period November 7, 1978, to June 30, 1986, totaled $553.9 million. The net operating revenues (after operating and depreciation expenses) was about $317 million. Most of the revenues were generated from concessions situated on non-trust lands. Indeed, a sizeable portion of the concession income came from the duty free shop located outside the airport proper. Assuming that the income of the airport trust

Table 7.5

Airports Division
Honolulu International Airport
Operating Income
November 7, 1978 - June 30, 1986
(In Millions of Dollars)

	Nov. 7 1978-6-30-79	FY 1979-80	FY 1980-81	FY 1981-82	FY 1982-83	FY 1983-84	FY 1984-85	FY 1985-86*	Total Nov. 7, 1978-June 30, 1986
Operating Revenues	38.0	55.0	60.0	63.0	61.7	68.6	70.5	75.4	492.2
and Landing Fees	--	--	--	--	17.5	11.2	15.0	18.0	61.7
Total Operating Revenues	38.0	55.0	60.0	63.0	79.2	79.8	85.5	93.4	553.9
Less:									
Operating Expenses	9.3	15.6	21.2	20.6	24.0	24.6	25.7	25.5	166.5
Operating Income									
Before Depreciation	28.7	39.4	38.8	42.4	55.2	55.2	59.8	67.9	387.4
Less:									
Depreciation Expense	4.7	7.6	8.8	8.9	9.4	10.2	10.3	10.4	70.3
Net Operating Income	24.0	31.8	30.0	33.5	45.8	45.0	49.5	57.5	317.1

*Preliminary Financial Data for FY 1985-86.

Source: Airports Division, Financial Audit Reports FY 1978-79 - FY 1984-85, and Preliminary Financial Data FY 1985-86.

lands is subject to chapter 10, how do we determine what portion of the airport's total gross or net revenue is to be accounted for under that chapter.

One alternative is to subject to the chapter only that portion of the revenues that actually and directly comes from the lands subject to chapter 10. As applied to the HIA, however, this approach produces only a negligible amount. As noted, most of the airport revenues are from concessions situated on non-trust lands. Most of the trust lands at the HIA consist of landing strips. The revenues most directly related to landing strips are the use charges (landing fees) charged the airlines. The amount of the charges depend on the amount of other revenues collected. Before 1982, due to the large amount of other revenues, no use charges had been assessed the airlines for years. In 1982, the airport-airlines leases were amended to require the payment of minimum use charges, but even then, due to the large amount of other revenues, the amounts collected on account of use charges have been relatively small. At HIA, the use charge collected between 1983 and 1986 averaged about $15 million per year, while operating revenues for this same period averaged some $69 million per year.

There is something to be said for attributing to the trust lands an amount greater than what is otherwise generated directly by these lands from user charges. The user charges are low because of the airport-airlines contractual agreement; the amount charged does not necessarily reflect the true value of the land on which the landing strips lie. Further, the concessions and the resultant revenues would not exist, but for the landing strips on trust lands.

A further problem with the above alternative is that it is workable only where revenues can be cleanly identified as being generated from trust or non-trust lands. At the HIA, concession revenues are clearly identifiable and they are substantially

all generated on non-trust lands. In other cases, it may not be so easy to identify what revenues are coming from trust lands and what revenues are coming from non-trust lands.

Another way to accomplish a division of the revenues between trust and non-trust lands is to attribute to the trust land so much of the revenues as they bear to the total revenues as the trust land acreage bears to the total acreage. When measured in this way, 76 per cent of the HIA revenues would become subject to chapter 10.

There is one other problem in this matter of allocating revenues between trust and non-trust lands with respect to the State's airports. The HIA is only one of several airports in a single, statewide airport system. The Hawaii airports as a system produced in the period November 7, 1978 to June 30, 1986, total operating revenues of $619.7 million and operating expenses of $295.6 million, for an operating income before depreciation of $324.1 million. After depreciation ($101.9 million), the net operating income was about $222.2 million. See Table 7.6. Every airport other than the HIA experienced a net operating loss. The application of chapter 10 to the statewide system figures will result in an amount smaller than if chapter 10 is applied on an airport by airport basis.

In this discussion, we have used the HIA as an illustration. A similar allocation problem exists in the State's commercial harbor system.

Income from land versus income from improvements. When lands, the income from which is subject to chapter 10, are leased to private individuals, clearly the chapter's 20 per cent provision applies to the lease rentals. However, the provision does not apply to the income that the lessees derive from the use of the lands. The income belongs exclusively to the lessees (except to the extent that the

Table 7.6

Airports Division
Statewide Operating Income*
November 7, 1978 - June 30, 1986
(In Millions of Dollars)

	Nov. 7 1978-6-30-79	FY 1979-80	FY 1980-81	FY 1981-82	FY 1982-83	FY 1983-84	FY 1984-85	FY 1985-86**	Total Nov. 7, 1978-June 30, 1986
Total Operating Revenues	41.0	60.0	65.3	68.7	87.0	89.7	97.4	110.6	619.7
Less:									
Total Operating Expenses	14.9	25.0	32.5	40.1	43.1	44.7	47.8	47.5	295.6
Operating Income Before Depreciation	26.1	35.0	32.8	28.6	43.9	45.0	49.6	63.1	324.1
Depreciation Expense	7.0	11.3	11.8	12.9	13.2	14.6	15.5	15.6	101.9
Net Operating Income	19.1	23.7	21.0	15.7	30.7	30.4	34.1	47.5	222.2

*Includes revenues and expenses from the following airports: Honolulu International, General Lyman Field, Ke-ahole, Upolu, Waimea-Kohala, Hana, Molokai, Kalaupapa and Port Allen.

**Preliminary financial data for FY 1985-86.

Source: Department of Transportation, Airports Division, Financial Audit Reports FY 1978-79 - FY 1984-85, and preliminary financial data FY 1985-86.

lease rental is based on the income of the lessees). Further, any income that the lessees derive from the improvements made to the lands at the cost of the lessees also belongs exclusively to the lessees.

It has been urged that when government operates a public enterprise on trust lands, government is in the same shoes as lessees of public lands and that, if anything is due OHA under chapter 10, the chapter ought to apply only to the rental value of the trust lands in its unimproved state and not to any income that may be derived from the use of lands or the improvements placed on the lands. This position has been advanced with respect to the State's airports and harbors. It is applicable to other government operated public enterprises such as public parking structures, and municipal golf courses.

The difficulty here is that government is not a lessee; it pays no rent; and the use to which it puts the trust land is in itself for a public purpose sanctioned by the Admission Act. Further, the proposal does not answer the hard questions such as (1) whether OHA is legally entitled at all to any part of the income generated by a public enterprise sitting in part on trust lands and in part on non-trust lands, with most of the revenues being derived on account of the non-trust lands, and if it is so entitled, how that portion to which it is entitled is to be determined and (2) whether OHA is entitled to share in such revenues notwithstanding that the enterprise generates no net income or bond covenants severely restrict the use to which the revenues derived may be put. Thus, the proposition that government pay OHA 20 per cent of the rental value of the trust land on which a public facility or enterprise sits is at best, a possible, practical solution to the problem of ascertaining the portion, if any, of the income of a public enterprise to which OHA is entitled.

Recommended Actions

In this section we suggest certain legislative actions to resolve the legal issues outlined above. The actions we recommend here will not necessarily eliminate all issues for all times. The proposed actions, however, should materially clarify OHA's entitlement to the proceeds and income of the public land trust.

Conform statute to the Constitution. The current difficulty in determining the entitlement of OHA, both in terms of the trust res and in terms of the "income" of the trust, arises mainly from the language of HRS chapter 10. To reiterate, section 10–3 defines "public land trust" as "all proceeds and income from the sale, lease, or other disposition" of Admission Act section 5(b) and section 5(e) lands. Then, section 10–13.5 provides for OHA expending 20 per cent of "all funds derived from the public land trust, described in section 10–3."

In both section 10–3 and section 10–13.5, the focus is on "income," and in section 10–3, OHA's entitlement is limited to the income from disposition of section 5(b) and section 5(e) lands. Neither section 10–3 nor section 10–13.5 conforms to the provisions of the state Constitution relating to OHA, although the express purpose of chapter 10 was to implement the state constitutional provisions. The definition of "public land trust" contained in section 10–3 is narrower than the definition provided in the state Constitution. The state Constitution adopts the Admission Act section 5(f) meaning of "public land trust." "Public land trust" under section 5(f) includes the lands, the income from the lands, and the proceeds from the disposition of lands described in section 5(b) and section 5(e) of the Admission Act and in Public Law 88–233.

With respect to OHA's entitlement, the state Constitution provides in article XII, section 6, that OHA is to manage and administer "*all* income and proceeds

from that *pro rata portion of the trust"* described in section 5(f) of the Admission Act. (Emphasis added). The Constitution's focus is on a pro rata portion of the trust res. OHA is entitled to *all* of the income and proceeds from that pro rata portion. If 20 per cent is OHA's share of the trust res, then OHA is entitled to *all* of the income and proceeds from 20 per cent of the trust. All income and proceeds from 20 per cent of the trust res is not the same as 20 per cent of the income of the trust, however the trust is defined.

We recommend that chapter 10 be amended to conform to the state Constitution. The trust res should be redefined and OHA's entitlement restated to all income and proceeds from 20 per cent of the trust res. What properties in the trust res should constitute the 20 per cent should be subject to negotiations between OHA and the state administration.

Conforming the statute to the state Constitution in the manner described above will have the following effects. First, questions about the inclusion within the trust res of (a) Public Law 88-233 lands, (b) the trust lands themselves, and (c) the income from the uses of the lands (and not just the proceeds from the disposition of trust lands) will be put to rest. Second, issues concerning the meaning of "income" will be minimized. All net income from that 20 per cent portion of the trust res set aside for OHA will be for OHA to manage and administer. Difficult questions about OHA's entitlement to airport and harbor revenues can be avoided by simply reaching an agreement that excludes the trust lands within the airport and harbor systems from OHA's 20 per cent share of the trust res. Other income producing lands could be included in OHA's share of the res.

Include all public lands within the trust. We suggest that the Legislature take one further step with respect to the trust res. As suggested before, we believe

that all public lands should be held in public trust, including all lands title to which vested in the State of Hawaii pursuant to section 5(a) of the Admission Act. Including all public lands within the public trust is in keeping with the trust concept that dates back to annexation. It further precludes the need for keeping accurate but costly inventories for the purpose of differentiating ceded from non-ceded lands and trust from non-trust lands.