

Honolulu, Hawaii

FEB 20 2009

RE: S.B. No. 995

S.D. 1

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

Madam:

Your Committee on Water, Land, Agriculture, and Hawaiian Affairs, to which was referred S.B. No. 995 entitled:

"A BILL FOR AN ACT RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS,"

begs leave to report as follows:

The purpose of this measure is to allow the State to most effectively and responsibly make progress toward meeting part of its constitutional, statutory, and moral obligation to native Hawaiians by addressing the additional amount of income and proceeds that the Office of Hawaiian Affairs is to receive from the public trust pursuant to Article XII, sections 4 and 6, of the Hawaii Constitution, for the period from November 7, 1978 to July 1, 2008.

Specifically, this measure:

- (1) Conveys certain parcels of real property in fee simple to the Office of Hawaiian Affairs; and
- (2) Supports the conveyance with appropriate provisions, such as exempting all the conveyed lands from the definition of "public lands" in chapter 171, Hawaii Revised Statutes, and exempting the conveyed lands located in Kakaako from the authority of the Hawaii Community Development Authority under chapter 206E, Hawaii Revised Statutes.



Testimony in support of this measure was submitted by one state agency, seven organizations, and twenty-seven public citizens. One state agency and one organization supported the intent of this measure. One state agency submitted comments, and testimony in opposition was submitted by three public citizens. Written testimony presented to your Committee may be reviewed on the Legislature's website.

In 1978, the State Constitution was amended to include article XII, sections 4 and 6 that, among other things, established the Office of Hawaiian Affairs and its Board of Trustees. Sections 4 and 6 of article XII of the State Constitution provide:

"Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

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

By Act 273, Session Laws of Hawaii 1980, the Legislature provided that "[t]wenty per cent of all funds derived from the public land trust, . . . shall be expended by the office of Hawaiian affairs . . . for the purposes of this chapter." This legislative directive has led to a series of lawsuits concerning the practical application of the twenty per cent apportionment the



Legislature established to implement article XII, sections 4 and 6, of the Constitution of the State of Hawaii.

In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154 (1987), the Hawaii State Supreme Court concluded that the issue of how the apportionment is formulated is a political question for the Legislature to determine.

In response to the *Yamasaki* decision, the Legislature enacted Act 304, Session Laws of Hawaii 1990, to clarify the extent and scope of the twenty per cent portion.

On September 12, 2001, the Hawaii State Supreme Court ruled in *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. 388, that Act 304 was effectively repealed by its own terms, so that once again, it was necessary for the Legislature to specify the apportionment to be managed and administered by the Office of Hawaiian Affairs.

In its decision, the Hawaii State Supreme Court affirmed *Yamasaki*, observing:

[T]he State's obligation to native Hawaiians is firmly established in our constitution. How the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. See Haw. Const. art. XVI, §7. . . [W]e trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS § 10-13.5 and enact legislation that most effectively and responsibly meets those obligations." *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. at 401.

In reviewing the entire history of the issue of the State's obligation to transmit to the Office of Hawaiian Affairs a part of the income and proceeds from the public land trust, your Committee finds that the issue has evolved into two principal aspects, one looking to the past, the other looking to the future.

With regard to the past, your Committee finds that in addition to the amounts of income and proceeds previously paid to



the Office of Hawaiian Affairs, further resources should be provided to the Office of Hawaiian Affairs that represent a re-examination and final determination by the Legislature for the period between November 7, 1978 (the ratification date of article XII, sections 4 and 6 of the Constitution of the State of Hawaii), and July 1, 2009, with regard to income and proceeds from the lands in the public trust referred to in article XII, section 4, of the Hawaii Constitution.

Your Committee further finds that the parcels of real property conveyed to the Office of Hawaiian Affairs should provide a revenue stream for the Office of Hawaiian Affairs, but also should be culturally significant parcels. Parcels of real property such as Kahana Valley, Mauna Kea, and state-owned fish ponds have a minimum tax assessed value but are historically and culturally significant for native Hawaiians. Your Committee believes that stewardship of native Hawaiian-culturally significant areas appropriately belongs to the Office of Hawaiian Affairs.

Your Committee recommends that future discussions of the parcels included by your Committee involve the communities affected. Your Committee notes that the inclusion of these parcels results from discussions with community members during the past year. In addition, according to the recollection of the Chair, a former Chairperson of the Board of Trustees of the Office of Hawaiian Affairs, several of the parcels that will provide a revenue stream were included in past negotiations between the Office of Hawaiian Affairs and the Attorney General. Thus, your Committee believes the included parcels represent a considered and fair compromise of the parties.

Your Committee recognizes that in Act 340, Session Laws of Hawaii 1993, the Legislature placed the island of Kahoolawe, a place of extraordinary cultural significance, into the public land trust under the condition that the State would eventually transfer the management and control of Kahoolawe to a future sovereign native Hawaiian entity upon its recognition by the United States and the State. Similarly, your Committee finds that Mauna Kea is an area of extraordinary cultural significance to native Hawaiians and requires special recognition, management, and control of its natural and cultural resources and should be held in trust for the recognized sovereign native Hawaiian entity.



In Hawaiian cosmology, Mauna Kea represents the *piko* of the island of Hawaii, which is the first-born island child of Wakea and Papahanaumoku, a product of the union of the sky and the earth. The relationship of this significant cultural sight to Hawaiians was evidenced by Queen Emma (the widow of Kamehameha IV) who in 1881 traveled to "the top of Mauna Kea to bathe in the waters of Waiau . . . to cleanse at the *piko* of the island." Kanahale and Kanahale 1997. Lake Waiau, the only high elevation lake in the State, is also considered a traditional cultural property and a source of sacred water used in healing and worship practices. The Mauna Kea Adze Quarry and Lake Waiau are important and unique cultural and geomorphic features found in the Mauna Kea Ice Age Natural Area Reserve and thus should be placed among those lands requiring native Hawaiian stewardship under the Office of Hawaiian Affairs.

Furthermore, your Committee understands both from the general public and from the Auditor that the State has failed to adequately protect Mauna Kea from cultural and environmental degradation and your Committee is mindful of the need for thoughtful and well-organized management. This measure will ensure that the recent decision of the Circuit Court of the Third Circuit in Civil No. 04-1-397, requiring the Board of Land and Natural Resources to take measures to protect and preserve the summit area of Mauna Kea through appropriate management plans to promote long-term sustainability, is enforced regardless of ownership.

Similar to the transfer of management and control of Kahoolawe to a future sovereign native Hawaiian entity upon its recognition by the United States and the State, your Committee finds that the same native Hawaiian sovereign entity should receive the lands transferred by this measure, including Mauna Kea.

Your Committee further finds that the Legislature acknowledged in Act 254, Session Laws of Hawaii 1993, that many native Hawaiians believe that lands taken without the consent of the native Hawaiian people should be returned and if not, then monetary compensation should be made. Therefore, this measure is a legislative response to the taking of the Hawaiian Kingdom without the consent or any compensation to the native Hawaiian people.

Your Committee has amended this measure by:



- (1) Deleting the dollar amount and leaving it unspecified for determination by the Committee on Ways and Means;
- (2) Amending the date of settlement to include the period between November 7, 1978 and July 1, 2009;
- (3) Deleting the conveyance of Hilo Banyan Drive, and parcels of Kakaako makai, as identified by the tax map keys 2-1-058:41 and 2-1-058:110;
- (4) Replacing the conveyances removed with the following parcels:
 - (A) Kahana Valley and Beach Park: (TMK: 5-2-01:1, 5-2-02: all, and 5-2-5:1 and 21 as described in Act 5, Sessions Laws of Hawaii 1987) and (TMK: 5-2-05:3);
 - (B) La Mariana and submerged lands: (TMK: 1-2-23:52);
 - (C) Accreted peninsula bordered by Kalihi Stream and Moanalua Stream: (TMK: 1-1-3:3);
 - (D) Heeia wetlands or fishpond: (TMK: 4-6-05:01);
 - (E) Mauna Kea: Mauna Kea Scientific Reserve: (TMK: 3-4-4-015: 9 and 12); Mauna Kea Ice Age Natural Area Reserve: a 143.5 acre square parcel around Puu Pohaku, located to the west of the summit area and a 3,750 acre triangular-shaped parcel extends from approximately 10,070 ft (3,069 m) up to 13,230 ft (4,033 m) at the upper tip of the parcel; and
 - (F) State-owned fishponds statewide: as identified in the Hawaiian Fishponds: Fishpond Database developed pursuant to a grant/cooperative agreement from the National Oceanic and Atmospheric Administration, Project No. R/AQ-60 (sponsored by the University of Hawaii Sea Grant College Program, SOEST, under Institutional Grant No. NA36RG0507 Year 31 from NOAA Office of Sea Grant, Department of Commerce); and
- (5) Providing that the transfer of Mauna Kea shall be subject to the Decision and Order of the Circuit Court



of the Third Circuit, Civil No. 04-1-397 (January 7, 2007), requiring action by the Board of Land and Natural Resources for the proper management of the area;

- (6) Requiring that the Office of Hawaiian Affairs transfer management and control of all parcels in this measure to the sovereign native Hawaiian entity upon its recognition by the United States and the State; and
- (7) Making technical, nonsubstantive amendments for clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Water, Land, Agriculture, and Hawaiian Affairs that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 995, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 995, S.D. 1, and be referred to the Committee on Ways and Means.

Respectfully submitted on
behalf of the members of the
Committee on Water, Land,
Agriculture, and Hawaiian
Affairs,



CLAYTON HEE, Chair



The Senate
 Twenty-Fifth Legislature
 State of Hawaii

Record of Votes
Committee on Water, Land, Agriculture and Hawaiian Affairs
WTL

Bill / Resolution No.:* SB 995	Committee Referral: WTL, WAM	Date: 2/13/09		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
HEE, Clayton (C)	✓			
TOKUDA, Jill N. (VC)	✓			
BUNDA, Robert				✓
FUKUNAGA, Carol	✓			
KOKUBUN, Russell S.				✓
TAKAMINE, Dwight Y.	✓			
HEMMINGS, Fred				✓
TOTAL	4	0	0	3
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes