



**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2009**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 902, RELATING TO LANDS CONTROLLED BY THE STATE.

**BEFORE THE:**

HOUSE COMMITTEE ON HAWAIIAN AFFAIRS

**DATE:** Wednesday, February 4, 2009 **TIME:** 9:00 AM

**LOCATION:** State Capitol, Room 329

**TESTIFIER(S):** Mark J. Bennett, Attorney General

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Chair Carroll and Members of the Committee:

The Department of Attorney General opposes this bill.

This bill amends chapter 171, Hawaii Revised Statutes, to prohibit certain sales, exchanges, or other alienations of ceded lands. The prohibition remains in effect "until the claims of the native Hawaiian people to the public land trust lands have been resolved or until the legislature finds that the State no longer supports reconciliation between the State and the native Hawaiian people."

We oppose this bill on both legal and policy grounds.

As to legal issues, the bill raises the potential for additional federal court lawsuits against the State by persons opposed to government programs that provide benefits to Native Hawaiians. Such lawsuits have been and continue to be filed. New lawsuits might claim, for example, that this legislation violates the Admission Act, which establishes a trust whose provisions and obligations are interpreted under federal common law, because a reasonable trustee would never foreclose in advance selling or exchanging land, no matter how favorable the circumstances, no matter how much the sale or exchange would advance the purposes of the Admission Act's public trust, and no matter how much the sale or exchange would benefit the trust's

beneficiaries, particularly for the reasons specified or implied by the bill.

New lawsuits might also challenge the legislation as violating the Fourteenth Amendment to the United States Constitution. Were this legislation to be adopted, such challenges might well not be subject to the procedural bars regarding, for example, standing and joining the United States as a party, that previous challenges have faced.

Similar issues could be raised with respect to the Hawaii State Constitution.

We also believe that it makes sense as a policy matter for the State to retain flexibility as to the use and management of its land. It is impossible to say in advance that beneficial opportunities for sales or exchanges cannot arise. Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii itself arose from the Legislature's specific direction to sell ceded land to implement the Admission Act's third purpose: developing "home ownership on as widespread a basis as possible," a purpose also embodied in Hawaii's Constitution, Article XI, section 10: "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."

We therefore respectfully ask the Committee to hold this bill.

LINDA LINGLE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
LAURA H. THIELEN  
Chairperson**

**Before the House Committee on  
HAWAIIAN AFFAIRS**

**Wednesday, February 4, 2009  
9:00 AM  
State Capitol, Conference Room 329**

**In consideration of  
HOUSE BILL 902  
RELATING TO LANDS CONTROLLED BY THE STATE**

House Bill 902 proposes to prohibit the disposition in fee simple of ceded lands. The Department of Land and Natural Resources defers to the Department of the Attorney General with regard to providing specific comments on this measure.

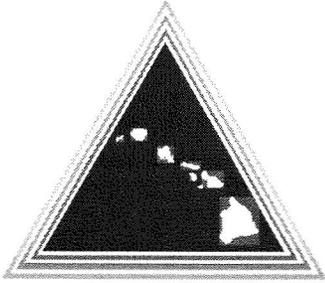
LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI  
FIRST DEPUTY

KEN C. KAWAHARA  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAIHOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**Sovereign Councils  
of the**



**Hawaiian Homelands  
Assembly**

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89-188 Farrington Highway  
Wai'anae, Hawai'i 96792  
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Kamaki Kanahele  
Chair  
O'ahu

Leah K. Pereira  
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Kaua'i

M. Kammy Purdy  
Secretary  
Moloka'i

M. Kanani Kapuniai  
Treasurer  
Hawai'i

Richard Soo  
Executive Director

**February 3, 2009**

To: **Rep. Mele Carroll, Chair  
Rep. Maile S.L. Shimabukuro, Vice Chair & Members of the  
Committee on Hawaiian Affairs**

From: **Kali Watson  
Chairman of Statewide Economic Development Committee  
SCHHA  
Honolulu, Hawaii 96792**

Re: **Hearing on HBs-902 & 1805 Relating to Lands Controlled by the  
State  
February 4, 2009 at 9:00am  
Conference Room 329, State Capitol**

**TESTIMONY IN SUPPORT**

Dear Chair Carroll, Vice Chair Shimabukuro and Members:

Thank you for the opportunity to provide testimony in support to HB 902 and 1805-relating to ceded lands. These bills prohibit the disposition in fee simple of ceded lands. The bills basically place a moratorium on ceded lands. If these bills should become law, they will force the State to carry out its fiduciary responsibilities to all the people of Hawaii, but especially to its indigenous Hawaiian people. The SCHHA supports the intent to place the State in the position of addressing and resolving the theft of lands from the Hawaiian people. If these "Ceded Lands" were lost forever through sales and transfers, then any settlement would be meaningless and empty for it is the "aina" or land that truly makes a nation whole and righteous.

The Sovereign Councils of the Hawaiian Homelands Assembly, formerly the State Council of Hawaiian Homestead Associations was founded more than 20 years ago to unite homestead communities and to advocate for the beneficiaries of the Hawaiian Homes Commission Act of 1921. The SCHHA is the oldest statewide advocacy organization representing the interests of more than 30,000 beneficiaries and families residing in the communities of the Hawaiian Home Land Trust. Its mission is to promote the self determination of native Hawaiians and the well being of homestead communities. DHHL lands are part of the ceded lands inventory.

I urge you to please pass these measures, HB 902 and 1805.

Sincerely,

*Kali Watson*

Kali Watson  
Chairman of Economic Development

**Rep. Maile Shimabukuro**

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**From:** Joel Fischer [jfischer@hawaii.edu]  
**Sent:** Monday, February 02, 2009 3:02 PM  
**To:** HAWtestimony  
**Subject:** HB902; HAW; @/4/09; 9AM; Rm 329

HB902, Relating to Lands Controlled by the State  
HAW; Chair, Rep Carroll

**PLEASE PASS THIS BILL!**

What Lingle and Bennett are trying to do to Native land is scandalous!

**HEWA!!!**

Trying to cell ceded lands, especially after the State Supreme court decision, is like driving a dagger into the heart of Native Hawaiian people. This is not, however, only an issue for Native people. It is an issue for all of us who support the rights and claims of the Kanaka Maoli, and who support human rights for all.

Lingle and Bennett know nothing about the history of these lands if they truly think they have the rights to them. When lands are stolen from a people, and then returned with restrictions, those people and their supporters are not bound by those restrictions. Ceded lands? NO! They are **stolen** lands!!

Lingle and Bennett actually assert that the Native people have a MORAL claim to those lands. If Lingle and her gang act in opposite ways to that which is moral, then their behaviors are hewa, i.e., immoral.

Please save the stolen lands and return them to the people.

Thank you.

Aloha, Joel

Dr. Joel Fischer, ACSW  
President, 19-3, Democratic Party

Professor  
University of Hawai'i, School of Social Work  
Henke Hall  
Honolulu, HI 96822

"It is reasonable that everyone who asks justice should DO justice."  
Thomas Jefferson

"There comes a time when one must take a position that is neither safe, nor politic, nor popular, but one must take it because one's conscience tells one that it is right."

Dr. Martin Luther King, Jr.

"Never, never, never quit."  
Winston Churchill

TO: COMMITTEE ON HAWAIIAN AFFAIRS  
Rep. Mele Carroll, Chair; Rep. Maile S.L. Shimabukuro, Vice Chair

Re: HB 902 RELATING TO LANDS CONTROLLED BY THE STATE

For hearing Wednesday, February 4, 2009 9:00 am Room 329

TESTIMONY IN OPPOSITION, By:  
Kenneth R. Conklin, Ph.D.  
e-mail Ken\_Conklin@yahoo.com

Aloha Chair Carroll, Vice Chair Shimabukuro; members, and public

I oppose HB 902

Books, scholarly articles, and legal briefs have been written about the ceded lands and their history. There's no way I can summarize all that in only a few pages; nor would you be interested in reading that.

But I will tell you a few things you might not have heard before, including a reminder of some things you are obligated to believe if you wish to continue in your position as a Legislator of the State of Hawaii.

HAWAII REALLY IS A PART OF THE UNITED STATES

Before briefly recalling the history, let me remind you that if you do not believe Hawaii is legally and morally a part of the United States, then you must immediately resign your position in the Legislature. Before you could run as a candidate or be seated, you were required to take an oath including "I will support and defend the Constitution of the United States." There's no room for quibbling here.

Hawaiian sovereignty activists claim that the revolution of 1893 that overthrew the monarchy was "illegal." They claim that the presence of 162 U.S. peacekeepers constituted an armed invasion (like China invading Tibet or Germany invading Poland), and that the U.S. apology resolution of 1893 is a confession of a crime under international law. They claim the annexation of 1898 was illegal (for many reasons, all

bogus). They claim the Statehood vote of 1959 was illegal. They claim the apology resolution of 1993 is a confession of a crime under international law which requires the U.S. to withdraw from Hawaii and provide huge reparations for 116 years of belligerent military occupation of the Hawaiian indigenous homeland.

My dear Legislator, if you believe any of those things you should immediately resign. You are violating your oath of office if you give credence to any of those assertions and, giving the benefit of the doubt to them, you then pass legislation that basically says "here's what we must do just in case this is true." You must stand firm, in public, in front of God and your fellow citizens, and you must say "I am proud to be an American, I have no doubt that Hawaii is the 50th State of the United States, and I will never support any legislation based on any doubt of that or which would in any way violate the U.S. Constitution."

Here are a few places where you can get more information about specific topics addressed above:

Historical Issues Related to Hawaiian Sovereignty -- Revolution (Overthrow of monarchy), Annexation, Statehood, Indigenous Status, Hawaiian Language Ban, Ceded Lands, Etc. This is a webpage whose purpose is to provide links to other webpages on specific historical topics. <http://tinyurl.com/3323rz>

What Does the United States Owe to Native Hawaiians? Two reports commissioned by Congress contain the answers (Morgan Report of 1894 about the revolution of 1893, and Native Hawaiians Study Commission report of 1983). Links to the full text of both reports, which are many hundreds of pages and well-documented. <http://tinyurl.com/b6lakw>

The 1993 apology resolution is filled with factual errors and distortions. Constitutional law scholar, attorney Bruce Fein, wrote a monograph which includes extensive, point-by-point refutation of it. See "Hawaii Divided Against Itself Cannot Stand" at <http://tinyurl.com/7d6xq>

Following the creation of the Republic of Hawaii in July 1894 by publication of its Constitution, there were Emperors, Kings, Queens, and Presidents of 20 nations on 4 continents who personally signed official letters recognizing the Republic as the rightful government of Hawaii de jure. Photos of the original letters in the state archives, plus Liliuokalani's letter of abdication and oath of loyalty to the Republic, can all be seen at <http://tinyurl.com/4wtwdz>

Lili'uokalani Loses A Big One (The Crown Lands) -- Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) <http://tinyurl.com/56czl>

THE PUBLIC LANDS OF HAWAII (INCLUDING THE "CEDED LANDS") BELONGED TO ALL THE SUBJECTS (CITIZENS) OF THE MULTIRACIAL KINGDOM OF HAWAII AND THE REPUBLIC OF HAWAII WITHOUT RACIAL DISTINCTION; WERE SET ASIDE BY THE U.S. AS A PUBLIC TRUST SOLELY TO BENEFIT ALL THE PEOPLE OF HAWAII WITHOUT RACIAL DISTINCTION DURING THE TERRITORIAL PERIOD; AND ONCE AGAIN BELONG TO ALL THE CITIZENS OF THE STATE OF HAWAII WITHOUT RACIAL DISTINCTION.

The Crown lands originally were set aside in the Mahele (1838) as the King's private property. But in 1865 the Kingdom Legislature passed a law to take government ownership of the crown lands in return for the government's issuance of bonds to pay off a mortgage the King had placed on the crown lands, which mortgage was in danger of foreclosure; and the King happily signed that law.

From that point forward the crown lands were merged with the government lands and became jointly the "public lands" except that the income from the crown lands was set aside by statute for the purpose of financing the official functions of the head of state (at that time the King). After the revolution there was no more monarch, so the "crown land" revenues went to support the functions of government in the same way as the old "government land" revenues.

Please note that throughout the history of the Kingdom of Hawaii there was never any racial set-aside of any lands communally for

native Hawaiians as a group. There were crown lands, government lands, and private lands; but there were never any "Native Hawaiian" lands.

In 1909 ex-queen Lili'uokalani filed a lawsuit in the U.S. Court of Claims demanding money for herself as compensation for the "confiscation" of "her" crown lands resulting from the annexation. In 1910 the court ruled that Liliuokalani had never personally owned the crown lands and therefore was not entitled to any compensation. Today's Hawaiian activists would do well to note that their hero Lili'uokalani never asserted that the ceded lands belonged communally to ethnic Hawaiians; and if she had won her lawsuit the money would have been paid to her personally and not to ethnic Hawaiians communally.

**SECTION 5(f) OF THE 1959 STATEHOOD ADMISSION ACT DOES NOT REQUIRE THAT ONE PENNY MUST BE SPENT SPECIFICALLY FOR ETHNIC HAWAIIANS TO THE EXCLUSION OF OTHERS. ETHNIC HAWAIIANS HAVE ZERO CLAIM TO ANY RACIAL SET-ASIDES.**

Section 5(f) says ceded land revenues can be spent for ANY ONE OR MORE of 5 purposes. One of those purposes is public education; and for the first 20 years of statehood virtually all the ceded land revenues was given to the public schools. Since 26% of the school children were ethnic Hawaiians, therefore ethnic Hawaiians received 26% of the ceded land revenues without any explicit racial set-aside.

One of the five purposes identified in section 5(f) is "for the betterment of native Hawaiians as defined in the Hawaii Homes Commission Act of 1921." The reason for including that among the 5 purposes was to allow ceded land revenues to be used to support the Hawaiian Homesteads, which are restricted to Hawaiians of at least 50% native blood quantum.

It may well be that HHCA of 1921 was unconstitutional. It is likely that section 5(f) of the Admission Act is unconstitutional to the extent that it is construed as giving the State of Hawaii permission to violate the 14th Amendment by setting aside some or all of the ceded land revenues to be used for a racially exclusionary purpose.

In any case, the racial set-aside apparently allowed under section 5(f) is exclusively for Hawaiians of 50% native blood quantum, and does not require or even contemplate any racial set-aside for all "one-drop" Hawaiians (the class eligible to sign up for Kau Inoa and join the much-anticipated Akaka tribe).

It is ludicrous to imagine that "Hawaiians" or "Native Hawaiians" as a group (as defined by statute according to the one-drop rule) have any legal or moral claim to the ceded lands. There are no legal or moral race-based claims which needs to be resolved before parcels of ceded lands can be sold. The only way such claims might be established is if you, the Legislature, decide to create such claims. Please don't do that. Just say no.

#### THE BIG PICTURE

I believe the single most important issue facing Hawai'i in the foreseeable future is the imminent and continuing threat that the lands, resources, government and people of Hawai'i will be divided along racial lines.

The Legislature has repeatedly passed resolutions favoring the Akaka bill to create a racially exclusionary government empowered to negotiate with YOU, the legislators. It is expected that you will give away massive amounts of land, money, and jurisdictional authority.

Numerous bills in the Legislature in recent years have tried to implement massive give-aways even before the tribe is created, and before any negotiations have started. That's absurd! No responsible negotiator gives away important concessions before the opponents even arrive at the table.

Please read "Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State" at <http://tinyurl.com/2a9fqa>

