

HB 2672
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS
House Committee on Hawaiian Affairs
House Committee on Water, Land & Ocean Resources

February 3, 2010
Room 329

9:00 a.m.

The Office of Hawaiian Affairs strongly supports, with an amendment, House Bill 2672 Relating to the Office of Hawaiian Affairs.

This bill seeks to have the State retire its \$200 million debt to OHA resulting from public land trust revenues unpaid from 1978 to 2010.

If enacted, HB 2672 will establish the debt at \$200 million and provide for annual payments of at least \$30 million beginning July 1, 2015 until the debt is paid. HB 2672 would also require the State to pay interest to OHA beginning July 1, 2010.

The delay in payment of the debt as permitted by this bill is OHA's recognition of the State's presently dire financial circumstances. However, the OHA Board of Trustees believes that the State's economy will be on its way to recovery within 3 to 5 years and the State will be well able to begin retiring the debt.

OHA also notes that by 2015, the State's obligation to pay \$30 million annually into the Hawaiian Home Lands Trust Fund under Act 14 of the 1995 Special Legislative Session will end.

HB 2672 provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for more than three decades and that the Hawai'i Supreme Court has ruled is primarily the responsibility of the Legislature. Appropriate legislative action would help fulfill the State's solemn obligation to OHA.

While a detailed historical narrative of the issue of land trust revenues would not be appropriate in this testimony, kindly note the following:

- Following many years of relatively small transfers to OHA, Act 304, Session Laws of Hawaii of 1990, sought

to establish how the State would carry out its state constitutional and statutory mandate to dedicate 20 percent of public land trust revenues to OHA's activities.

- Act 35, Session Laws of Hawaii 1993, appropriated \$136.5 million in general obligation bond funds to OHA as a settlement of undisputed claims to that point in time.
- Act 329, Session Laws of Hawaii 1997, established OHA's pro rata share to be \$15.1 million for each of the fiscal years 1997-1998 and 1998-1999.
- In 2001, the Hawaii Supreme Court ruled that Act 304 was invalid due to a conflict between one of its technical provisions and federal law.
- Act 34, Session Laws of Hawaii 2003, required the transfer of several million dollars to OHA to help continue the revenue stream following the court ruling against Act 304.
- Executive Order No. 03-03 set forth Governor Lingle's procedure for continuing the revenue stream.
- Act 178, Session Laws of Hawaii 2006, included an interim provision setting OHA's annual amount of land trust revenues at \$15.1 million and providing a lump sum payment of \$17.5 million for certain amounts that the Legislature determined were underpaid between July 1, 2001 through June 30, 2005.

We request one amendment to the bill. In the version of this measure that was included in OHA's 2010 legislative package, the date July 1, 2010, not July 1, 2008, was used in what is now page 5, line 6 of the bill. We respectfully request that your committee use July 1, 2010, for accuracy and for consistency with our proposal.

We thank you for considering this bill. The issue is complex, but when thirty years of struggle to address this issue are examined, one key truth remains: it is ultimately the Legislature's task to resolve the issue.

We urge your Committee to respond favorably to this bill by moving it forward with the amendment that we have proposed in this testimony.

Mahalo for the opportunity to testify.

OPPOSED

HOUSE OF REPRESENTATIVES, STATE OF HAWAII
TWENTY-FIFTH LEGISLATURE, 2010

COMMITTEE ON HAWAIIAN AFFAIRS
COMMITTEE ON WATER, LAND & NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
and
COMMITTEE ON FINANCE

Re: **HB 2672** Proposed final determination by legislature that an additional \$200 million should be provided to OHA as income and proceeds from the Ceded Lands Trust for the period between 11/7/1978 and July 1, 2008.

For Hearing Date: Wednesday, February 3, 2010
Time: 9:00 a.m.
Place: Conference Room 329

TESTIMONY IN OPPOSITION by H. William Burgess, Attorney and
Chairman, Aloha for All, Inc. Email: hwburgess@hawaii.rr.com

Aloha Chairs, Vice Chairs, committee members, and members of the public.

I am writing in opposition to HB 2672, which calls for the State to distribute an additional \$200 million to OHA as income and proceeds from the Ceded Lands Trust for the betterment of the conditions of native Hawaiians.

The Ceded Lands Trust was established in 1898 when the United States accepted the Republic of Hawaii's 1897 Treaty of Annexation which offered to cede to the U.S. Hawaii's public lands (about 1.8 million acres formerly called the Crown lands and Government lands during the years of the Kingdom of Hawaii after the Mahele). The Republic's offer was on the condition that the U.S. hold the revenues and proceeds of the ceded lands, except for the lands used for the military, naval or civil purposes of the US or for local government, "solely for benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

When the government of a democracy (like the federal, state and local governments in the United States) holds land in trust, it is subject to

fiduciary duties under basic trust law principles: For example, under HRS 708-830, a government official or employee who knowingly fails to make a required disposition of funds held by the government is guilty of theft, a felony, or misapplication of entrusted funds under HRS 708-874, a misdemeanor.

The State's "bombshell" revelation. On June 4, 2008 in the Federal District Court in *Day v. Apoliona*, the State of Hawaii acknowledged and proved by the declarations of Georgina Kawamura, Director of B&F and other responsible State officials, that the Ceded Lands Trust costs the State every year many times more than the 1.2 million acres bring in; and that the disparity between Trust expenses and Trust revenues has occurred in every year since Statehood in 1959.

Basic Trust law as to distributions to beneficiaries. Except as otherwise provided by the terms of the trust, the Trustee's duty to pay income to beneficiaries is limited to paying the **net** income after deducting, from the revenues or gross income, the expenses properly incurred in the administration of the trust.

Why is that important? Because it means the hundreds of millions State officials have distributed to OHA from Ceded Lands Trust revenues exclusively "for the betterment of the conditions of native Hawaiian" beneficiaries over the last three decades (while making no distributions exclusively for non-native Hawaiian beneficiaries) have all been improper diversions of trust funds held for the benefit of all the people of Hawaii.

No Ceded Lands Trust funds should ever have been distributed to OHA because the trust has never generated any net income from which distributions could lawfully have been made to any beneficiaries.

HB 2672 would condone further plunder of funds held by the State in trust for all the people of Hawaii. The bill should be amended to require that OHA forthwith restore to State control {or transfer to a bonded official of the State of Hawaii) all Ceded Lands revenues or proceeds it now holds and any growth or earnings and properties acquired with those misapplied trust funds.

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