

MAR 13 2013

SENATE RESOLUTION

REQUESTING THE UNIVERSITY OF HAWAII WILLIAM S. RICHARDSON SCHOOL OF LAW TO PROVIDE AN UPDATED STUDY TO THE LEGISLATURE ON ANY OF THE ISSUES RELATED TO PUBLIC CONCERN OR CONTENTIOUSNESS OVER THE USE OF PUBLIC LANDS AND POTENTIAL RAMIFICATIONS SURROUNDING THE USE OF AVAILABLE LANDS, PUBLIC LANDS, AND CEDED LANDS.

1 WHEREAS, our democratic system of government is founded
2 upon the belief that a system of checks and balances is
3 necessary to prevent the usurpation of power by any one of the
4 three branches of government from the others; and

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6 WHEREAS, the doctrine of separation of powers is that a
7 government functions best when its powers are not concentrated
8 in a single authority but divided among different branches; and

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10 WHEREAS, under the separation of powers doctrine, laws are
11 created and passed by the Legislature, which are enforced and
12 implemented by the Executive and interpreted by the Judiciary;
13 and

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15 WHEREAS, the doctrine of separation of powers is one of the
16 fundamental cornerstones in our governmental structure, a
17 doctrine that encapsulates the ideals of a democratic
18 government, a doctrine heavily influenced by those that have
19 experienced a tyrannical government where the power to make,
20 enforce, and interpret law lay in the hands of one or only a few
21 individuals; and

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23 WHEREAS, James Madison stated, "The accumulation of all
24 powers, legislative, executive, and judiciary, in the same
25 hands, whether of one, a few, or many, ... may justly be
26 pronounced the very definition of tyranny ... [T]he preservation
27 of liberty requires that the three great departments of power
28 should be separate and distinct"; and

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30 WHEREAS, the original framers of the United States
31 Constitution found it imperative to distinguish the roles of
32 each branch of government and to expressly delegate certain



1 powers and responsibilities to each branch, which ensures that
2 no central authority will ever become too powerful to endanger
3 the liberties of the people; and
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5 WHEREAS, as James Madison stated, "Power belonging to one
6 of the departments ought not be directly and completely
7 administered by either of the other departments. It is equally
8 evident, that none of them ought to possess, directly or
9 indirectly, an overruling influence over the others, in the
10 administration of their respective powers. It will not be
11 denied, that power is of an encroaching nature, and that it
12 ought to be effectually restrained from passing the limits
13 assigned to it"; and
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15 WHEREAS, the Hawaii State Constitution provides in article
16 III, section 1, "The legislative power of the State shall be
17 vested in a legislature ... Such power shall extend to all
18 rightful subjects of legislation"; and
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20 WHEREAS, article XI, section 2, of the Hawaii State
21 Constitution states, "The legislature shall vest in one or more
22 executive boards or commissions powers for the management of
23 natural resources owned or controlled by the State"; and
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25 WHEREAS, it is the responsibility or the kuleana of the
26 Legislature to enact the laws that govern the State of Hawaii
27 that includes laws defining the appropriate use of the State's
28 land and natural resources, while ensuring that these resources
29 are maintained for the benefit of the people of Hawaii; however,
30 this task is often frustrated by executive agencies in their
31 administrative rules and by the judiciary in its interpretation
32 of statutes and constitutional provisions; and
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34 WHEREAS, although judicial legislation is not unique to
35 Hawaii, it has become increasingly prevalent in the Hawaii
36 Supreme Court's opinions concerning land use and water law; and
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38 WHEREAS, there is a noticeable trend in Hawaii Supreme
39 Court opinions to regularly vacate the decisions of our
40 commissions and agencies on grounds based apparently on nothing
41 more than the Court's beliefs and policies that lack sufficient
42 foundation in legal precedent, which is judicial activism that
43 creates uncertainty among the public and among the commissions
44 and agencies tasked with implementing the laws; and



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2 WHEREAS, the Court's creation of new laws and policies
3 through judicial law making encroaches upon the powers and
4 responsibilities of the Legislature to make laws; and

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6 WHEREAS, judicial law making is an egregious over stepping
7 when constitutional provisions and statutes exist that are
8 intended to apply to the facts of the case before the court, in
9 which case the courts should not be making new law but instead
10 should be limited to determining whether or not the applicable
11 statute applies to the particular case before the court; and

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13 WHEREAS, in the Waiahole Ditch case (*In the Matter of the*
14 *WATER USE PERMIT APPLICATIONS*, 94 Haw. 97 (2000)) involving a
15 contested case hearing before the Water Resource Management
16 Commission, the Commission entered an order apportioning water
17 for various agricultural, nonagricultural, and leeward off
18 stream uses; and

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20 WHEREAS, in affirming the Waiahole Ditch decision of the
21 Water Resource Management Commission, the Hawaii Supreme Court's
22 opinion rested on an antiquated and obsolete doctrine of public
23 trust, which had not been mentioned by previous court rulings in
24 water law cases since the 1800's, including that the "public
25 trust doctrine" is a fundamental principle of constitutional law
26 in Hawaii and that the framers of the constitution intended to
27 adopt the doctrine through article XI, section 1 (conservation
28 and development of resources), of the Hawaii State Constitution;
29 and

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31 WHEREAS, the Court then proceeded to expand the scope of
32 the doctrine to include all water resources, unlimited by any
33 surface or ground distinction, under a broad interpretation of
34 "all public natural resources" as stated in article XI, section
35 1, of the Hawaii State Constitution; and

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37 WHEREAS, the Waiahole Ditch decision did not follow the
38 long line of previously decided water dispute cases but took on
39 a separate path by using the public trust doctrine on water
40 resources; the Court had no authority to create a new law as it
41 relates to the scope of the public trust doctrine; and

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43 WHEREAS, another more recent example is the "rail decision"
44 in Kaleikini v. Yoshioka (August 24, 2012), in which the Hawaii



1 Supreme Court interpreted the provisions of chapter 6E, Hawaii
2 Revised Statutes, to add a new requirement that archaeological
3 inventory surveys must be complete as to all phases of a project
4 before a project may begin; in this case, the City and County of
5 Honolulu and State argued that the project's programmatic
6 agreement provided that as long as an archaeological survey was
7 prepared for a particular phase, construction could begin on
8 that part of the project although surveys were not prepared for
9 the other phases; and

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11 WHEREAS, in the Kaleikini case, the Court acknowledged the
12 absence of an express phasing provision but reasoned that the
13 review process for the entire project area must be completed
14 prior to the State Historic Preservation Division giving its
15 concurrence in the project; in doing so, the Court created a new
16 rule of practice and procedure for the agency, which intrudes
17 upon the agency's authority and discretion; and

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19 WHEREAS, in Ka Pa'akai o Ka 'Aina v. Land Use Commission,
20 decided in 2000, the Court created an analytical framework for
21 state agencies to follow when making decisions that affect
22 native Hawaiian rights, specifying three areas that need to be
23 addressed by state agencies when making such decisions; and

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25 WHEREAS, the Ka Pa'akai o Ka 'Aina decision mandated that
26 agencies must state: (1) definitive findings regarding the
27 extent of native Hawaiian practices, (2) definitive findings
28 about the practices undertaken outside of the area of concern or
29 the subject of the permit, and (3) specific findings or
30 conclusions regarding the effects on the impairment of any water
31 uses under article XII, section 7, of the Hawaii State
32 Constitution, relating to traditional and customary rights; and

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34 WHEREAS, by mandating that the agencies make these specific
35 findings, the Court interfered judicially in the role of the
36 Commission by replacing the discretion of the Commission with
37 its own views of what the public interest should be and which
38 considerations must be given more weight than others; and

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40 WHEREAS, twelve years after establishing its own policy in
41 the Ka Pa'akai o Ka 'Aina decision, the Hawaii Supreme Court
42 relied upon that policy as establishing precedent when it
43 overruled the Water Resource Management Commission in *In re 'Iao*



1 *Ground Water Management Area High-Level Source Water Use Permit*
2 *Applications* (August 16, 2012), holding that although the
3 Commission was thorough in several respects, because it failed
4 to issue specific findings or conclusions in accordance with the
5 rule established in Ka Pa'akai o Ka 'Aina, its decision and order
6 must be vacated; and

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8 WHEREAS, judicial legislation affects not only the
9 immediate parties to a proceeding, but also creates
10 unpredictability for the public and private sectors and
11 hamstrings commissions and agencies by the new policies and
12 procedures created by the Judiciary; and

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14 WHEREAS, the Legislature should not continue to abdicate to
15 the Judicial branch unpredictable and unwarranted judicial
16 interpretations that contradict legislative intent, thereby
17 shifting the balance of powers to the Judiciary; and

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19 WHEREAS, the Legislature must create the laws and policies
20 that shape and help determine the use of lands and resources
21 entrusted to the people of Hawaii; and

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23 WHEREAS, an updated study on public lands is necessary; and

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25 WHEREAS, the University of Hawaii William S. Richardson
26 School of Law has the knowledge, expertise, and resources to
27 gain a firm grasp of the public concern and contentiousness over
28 public lands and to study potential ramifications to public
29 lands and potential ramifications surrounding the use of
30 available lands, public lands, and ceded lands; now, therefore,

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32 BE IT RESOLVED by the Senate of the Twenty-seventh
33 Legislature of the State of Hawaii, Regular Session of 2013,
34 that the University of Hawaii William S. Richardson School of
35 Law is requested to provide an updated study to the Legislature
36 on any of the issues related to public concern or
37 contentiousness over the use of public lands and potential
38 ramifications surrounding the use of available lands, public
39 lands, and ceded lands; and

40 BE IT FURTHER RESOLVED that the University of Hawaii
41 William S. Richardson School of Law is requested to report its
42 findings and recommendations to the Legislature no later than



1 twenty days prior to the convening of the Regular Session of
2 2014; and

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4 BE IT FURTHER RESOLVED that a certified copy of this
5 Resolution be transmitted to the University of Hawaii William S.
6 Richardson School of Law.

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9 OFFERED BY:



