

STAND. COM. REP. NO.

1083

Honolulu, Hawaii

MAR 27 2009

RE: H.B. No. 901  
H.D. 2  
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 H.B. No. 901, H.D. 2, 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.

Testimony in support of the measure was received from one state agency and two private organizations. One private organization testified in opposition to the measure. Written testimony presented to the Committee may be reviewed on the Legislature's website.

Your Committee finds that the issue of the State's obligation to transmit to the Office of Hawaiian Affairs a part of the income and proceeds of the public land trust has been an unresolved topic of discussion since 1978 when the State Constitution was amended to recognize the State's obligation to native Hawaiians. The inability to find a resolution of this issue is not because of a

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lack of effort or will. Since 1978, this issue has had the benefit of the effort and insight of four different governors and thirty legislative sessions.

Two state laws were enacted during this thirty year period: Act 273 in 1980, and Act 304 in 1990. Both Act 273 and Act 304 provided that twenty per cent of the funds derived from the public land trust was to be expended by the Office of Hawaiian Affairs to benefit native Hawaiians; however, both Acts faced legal challenges in Hawaii courts concerning the practical application of the twenty per cent apportionment established by the Legislature, with the last challenge resulting in Act 304 being effectively repealed so that once again, it became necessary for the Legislature to enact a new law.

Your Committee recognizes two new and significant events that make urgent legislative action on this issue this year:

- (1) The election of President Barack Obama, a native son of this State who grew up in the midst of these issues and has personal experience of this State's attempt to satisfy its obligation to the native Hawaiian people. President Obama has publicly stated his support for the reconciliation effort and the passage of the Akaka Bill which, upon passage, establishes the federal government's recognition of the legality and legitimacy of a sovereign native Hawaiian entity; and
- (2) The political situation in Congress this year has improved the chances for the passage of the Akaka Bill. The members of Hawaii's congressional delegation presently enjoy powerful and influential positions, and all four of Hawaii's congressional members have placed passage of the Akaka Bill as a high priority on their legislative agendas.

It is possible, if not probable, that the federal government will soon take action to pass the Akaka Bill, which will lead to recognition of the reorganized single native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and the native Hawaiian governing entity for the purposes of continuing a government-to-government relationship. The income and proceeds that the Office of Hawaiian Affairs is to receive from the public land trust shall be transferred at the time of federal and state recognition to the



sovereign native Hawaiian entity. It is important and only proper that the State, in light of the federal government's progress on the issue of federal recognition of the sovereign native Hawaiian entity, fulfill its obligation which has remained unfulfilled for more than thirty years.

Equally important is the recognition that the question of *how* the State satisfies its obligation to native Hawaiians is to be determined by the Legislature, and not the executive or judicial branches of state government.

On this point, the Hawaii Supreme Court has stated in *Office of Hawaiian Affairs v. State of Hawaii*, 96 Hawaii 388, at 401 (2001), that:

. . . the 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, Section 7. . . . [W]e trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians . . . and enact legislation that most effectively and responsibly meets those obligations. (emphasis added)

Also, agreeing on this point are the statements and positions of General Bennett in the recent oral arguments before the United States Supreme Court in *Hawaii vs. Office of Hawaiian Affairs*, No. 07-1372. See the following excerpts of the transcript of the oral arguments:

- (1) Questioning by Justice Breyer, beginning on page 16, line 13:

JUSTICE BREYER: Could the Hawaiian Legislature pass a law saying that the Native Hawaiians have claims? Those claims, because of the Federal 1950 - whatever it is - are not valid any more. But that was pretty unfair to them. And, therefore, what we think we should do is the



following. And then they pass a whole lot of things that they think would be appropriate to do in light of what I just said. What stops that?

MR. BENNETT: Your Honor, the - legislature has wide discretion in managing and disposing of the assets. (emphasis added)

- (2) Questioning by Justice Ginsburg, beginning on page 16, line 25:

JUSTICE GINSBURG: And the legislature, if they wanted to - as I understand the Admission Act, it lists five purposes to any one purpose. And the legislature, if it so chose, could say, we want this property - the proceeds from this property to be for the exclusive betterment of the conditions of the Native Hawaiians. They could. It would be up to the legislature to give it all to the Native Hawaiians.

MR. BENNETT: That would not violate the Admission Act, your Honor. (emphasis added)

- (3) Questioning by Justice Scalia, beginning at page 17, line 12:

JUSTICE SCALIA: Would it violate the Admission Act if the legislature had not said - said we are giving it to them because we want to, because we think it's a good idea. No, we are giving it to them because we think they have a right to it.

MR. BENNETT: Your Honor-

JUSTICE SCALIA: And we feel that we must give it to them because it's theirs.

MR. BENNETT: Your Honor, the -

JUSTICE SCALIA: Would that violate the Admission Act?



MR. BENNETT: The legislature believed that it bettered the condition of Native Hawaiians to provide proceeds from land to the Native Hawaiians. The Admissions Act gives them that ability to do it. (emphasis added)

Furthermore, Governor Lingle stated at the end of the 2008 Legislative Session that her staff will not return to the negotiating table with Office of Hawaiian Affairs leaders. (See, "*Ceded-Land Deal at Impasse*," written by Gordon Y.K. Pang, The Honolulu Advertiser, May 6, 2008.) Quoted also in this news article was Mr. Lenny Klompus, Governor Lingle's Senior Advisor - Communications: "[s]he (Governor Lingle) would not resume negotiations with OHA or offer any new proposals to the Legislature regarding the settlement." The news article goes on to state that Mr. Klompus said that the administration was seeking to help the Legislature with its responsibility. Clearly, Governor Lingle and her staff views the legislative body as having primary if not total responsibility to address and negotiate the issue of how the State satisfies its obligation to native Hawaiians.

Thus, it is clear that both Hawaii's judicial and executive branches of government are looking to the Legislature to take the lead to answer the question of how the State satisfies its obligation to native Hawaiians. This recognition, coupled with the urgency of the State's need to act expeditiously in light of the favorable political situation in Washington D.C. on the native Hawaiian sovereignty issue, requires this Legislature to enact legislation this year.

Furthermore, your Committee is aware of concerns that the continuation of the \$15.1 million in annual payments beyond the current fiscal year from the State to the Office of Hawaiian Affairs is not guaranteed. Your Committee understands and acknowledge the concern that future legislative actions may diminish or eliminate this arbitrary payment and that this leaves the Office of Hawaiian Affairs in an untenable situation having to rely on such a large and uncertain source of funds.

Your Committee is also aware of the negotiations between the Office of Hawaiian Affairs and past governors and the present governor toward meeting the State's obligation to native Hawaiians as set forth in the State Constitution. Your Committee finds that the issue has evolved into two principal aspects, one regarding a



resolution of the past obligations (i.e., from November 7, 1978 to the present), and the other regarding a resolution of the future obligations (i.e. from the present to the final reconciliation of the claims of the native Hawaiian people).

Your Committee believes that the appropriate approach to a resolution of these issues is to either:

- (1) Provide the framework for the State to reach a "global settlement" which shall include the past and future obligations of the State to the native Hawaiian people; or
- (2) Make progress toward meeting a part of the State's past obligations to native Hawaiians by addressing the additional amount of income and proceeds that the Office of Hawaiian Affairs is to receive from the public land trust pursuant to article XII, sections 4 and 6 of the Hawaii Constitution, for the period from November 7, 1978 to July 1, 2008.

Your Committee has amended this measure to accomplish the above as follows:

- (1) Part I of the amended measure sets forth this Legislature's attempt to reach a "global settlement" of the past and future obligations of the State to the native Hawaiian people. Your Committee finds that the proposal previously made by Governor Ben Cayetano in March 31, 1999, is a sensible and appropriate approach toward a "global settlement" and that it should be re-offered to the Office of Hawaiian Affairs.

The "global settlement" offer includes:

- (A) Monetary payment to the Office of Hawaiian Affairs of \$251 million;
- (B) Conveyance of public lands from the State to the Office of Hawaiian Affairs equal to twenty per cent of the 1.8 million acres of ceded lands already inventoried; and
- (C) The suspension of the \$15.1 million in annual payments to the Office of Hawaiian Affairs



effective upon a date to be agreed upon in good faith between the State and the Office of Hawaiian Affairs.

The Office of Hawaiian Affairs shall make a decision to accept or reject the "global settlement" and notify the Governor, the President of the Senate and the Speaker of the House of Representatives of its decision in writing on or before January 1, 2010. Any failure to properly and timely respond to the "global settlement" offer shall be deemed to be a rejection of the "global settlement."

The Legislature may structure the payment of the \$251 million over time provided that the payment plan shall include the following:

- (A) Interest on the principal balance at the rate provided by law under section 478-2, Hawaii Revised Statutes; and
- (B) Equal annual payments commencing on a date to be agreed to in good faith by and between the State and the Office of Hawaiian Affairs. The State may fund the \$251 million through the issuance of general obligation bonds.

The conveyance of public lands equal to twenty per cent shall be on an "acre for acre" basis (i.e., twenty per cent of 1.8 million acres as opposed to twenty per cent of the combined value of the 1.8 million acres); however, the Office of Hawaiian Affairs and the State may agree to a different method of calculation, provided that the different method of calculation must be determined prior to July 1, 2010.

- (2) If a "global settlement" cannot be reached, Part II of the measure sets forth the Legislature's approach to alternatively address the issue regarding past obligations only. The dollar value of \$200 million represents the amount agreed to between the Office of Hawaiian Affairs and Governor Lingle regarding the resources that should be provided for the period between November 7, 1978, and July 1, 2008. Your Committee



finds that \$200 million for the past obligations is a fair and reasonable payment.

At the discretion of the Office of Hawaiian Affairs, payment of the \$200 million may be accomplished by either:

- (A) A \$200 million monetary payment;
- (B) Conveyance of properties in the public land trust with a combined tax assessed value of \$200 million; or
- (C) A combination of cash payments and conveyance of properties totaling \$200 million.

If the Office of Hawaiian Affairs chooses to accept a \$200 million monetary payment, it must notify the Governor, the President of the Senate and the Speaker of the House of its decision in writing by January 1, 2010. Failure of the Office of Hawaiian Affairs to respond to the Governor, the President of the Senate and the Speaker of the House by January 1, 2010, shall be deemed to be a rejection of the Office of Hawaiian Affairs' right to accept the \$200 million monetary payment option.

If the Office of Hawaiian Affairs chooses the \$200 million monetary payment option, the Legislature may structure the payment of \$200 million over time provided that the payment plan shall include the following:

- (A) Interest on the principal balance at the rate provided by law under section 478-2, Hawaii Revised Statutes; and
- (B) Equal annual payments commencing on a date to be agreed to in good faith by and between the State and the Office of Hawaiian Affairs. The State may fund the \$200 million through the issuance of general obligations bonds.

If the Office of Hawaiian Affairs rejects the \$200 million monetary payment option, it shall select and receive from the State certain public lands, provided





that the combined value of the properties selected by the Office of Hawaiian Affairs shall not exceed \$200 million. The public lands to be offered to the Office of Hawaiian Affairs are the following:

- (A) From Governor Lingle's 2008 proposal, the Kakaako and Kalaeloa properties.
- (B) From former Governor Waihee's prior proposal, Waikiki Yacht Club, Army and Air Force Exchange Services ("AAFES") Building in Kakaako, Pier 60 at Sand Island, the accreted peninsula at Keehi Lagoon.
- (C) The Senate's Proposal: Mauna Kea, La Mariana and submerged lands (Pier 60 Area), State-owned fishponds, Kahana Valley and Beach Park, and the Heeia meadowlands.

The Office of Hawaiian Affairs shall select the properties on the later of July 1, 2010, or six months after all of the property information is provided from the State. The value of the property shall be its most recent tax assessed value, adjusted by the twenty per cent offset of all ceded lands conveyed to the Office of Hawaiian Affairs.

To the extent the combined value of the properties received by the Office of Hawaiian Affairs is less than \$200 million, the difference shall be paid to the Office of Hawaiian Affairs by the State pursuant to a payment plan with the following terms:

- (A) Interest on the principal balance at the rate provided by law under section 478-2, Hawaii Revised Statutes; and
- (B) Equal annual payments commencing on January 1, 2011 and ending on January 1, 2015.

The current \$15.1 million in annual payments from the State to the Office of Hawaiian Affairs shall remain uninterrupted for FYs 2009-10 and 2010-11. Your Committee again notes and recognizes the possibility of the reduction or elimination of the prospective \$15.1



million payments and that this information is provided to the Office of Hawaiian Affairs so that it may be taken into consideration when analyzing the options contained in Part II of the amended measure;

- (3) In either settlement option, the specific public lands that are to be conveyed by the State to the Office of Hawaiian Affairs is to be determined by negotiation between the Governor and the Office of Hawaiian Affairs with reasonable diligence, in good faith, and shall be completed on or before January 1, 2015, unless mutually extended by the State and the Office of Hawaiian Affairs;
- (4) Upon executing a settlement agreement, the Governor shall include in the Governor's financial plan for the years following the executed settlement agreement, the payments to be made and any revenue impact experienced from the conveyance of any land to the Office of Hawaiian Affairs; and
- (5) The Office of Hawaiian Affairs and the Governor's Office are required to submit a report on the status of the negotiations to the Legislature no later than twenty days prior to the convening of the 2010 Regular Session.

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 H.B. No. 901, H.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 901, H.D. 2, S.D. 1, and be referred to the Committees on Judiciary and Government Operations and Ways and Means.

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

  
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CLAYTON HEE, Chair



