

STAND. COM. REP. NO.

1080

Honolulu, Hawaii

MAR 27 2009

RE: H.B. No. 921
H.D. 1
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. 921, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO PUBLIC LANDS,"

begs leave to report as follows:

The purpose of this measure is to expand the potential assignees of a homestead lease to include trustees of land trusts created for the purposes of managing and holding a homestead for the benefit of the lessee and the lessee's family member.

Testimony in support of this measure was submitted by two organizations. Testimony in opposition was submitted by one state agency and one public citizen. Written testimony presented to your Committee may be reviewed on the Legislature's website.

Although your Committee recognizes the problems addressed by this measure, serious concerns have been raised regarding the legal issues involved with assigning the homestead lease to land trusts.

Your Committee finds that asserting the Legislature's management authority over ceded lands is an immediate concern that needs to be addressed in light of the recent United States Supreme Court oral arguments for *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, 117 Hawaii 174 (2008).



Your Committee has amended this measure by:

- (1) Replacing its contents with the contents of S.B. No. 1085, S.D. 1, which was earlier passed by the Senate, with amendments and which prohibits the sale or transfer of ceded lands, with certain specified exceptions, until the claims of the native Hawaiian people have been resolved or until the Legislature finds by concurrent resolution that the State no longer supports reconciliation between the State and the native Hawaiian people; and
- (2) Inserting language to permit the Department of Hawaiian Home Lands to negotiate lease terms beyond sixty-five years, and provide a right of first refusal to previous lessees.

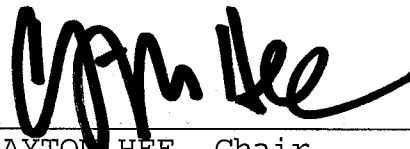
Your Committee notes that the recent United States Supreme Court oral argument referenced the ongoing legislative session. Justice Alito asked the Attorney General, "would there be anything to prevent the Hawaiian legislature from passing a law that says . . . we are going to impose a five-year moratorium on any transfer of these lands because we want to promote a reconciliation process?" Transcript of Oral Argument at 11, *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, 117 Hawaii 174 (2008) (No. 07-1372). This line of inquiry was later iterated by Justice Breyer, indicating that the Justices are clearly contemplating action by this Legislature. Transcript of Oral Argument at 16, *supra*. Justice Souter summed up the discussion by saying, "the Supreme Court of Hawaii, in effect, has said the land is tied up until these people who are currently negotiating, the State, the Native Hawaiians . . . all come to a . . . resolution and a reconciliation. . . They are just saying, no more land transfers until these people sit down and make up their differences." Transcript of Oral Argument at 24-25. Thus, your Committee believes in light of the Hawaii State Supreme Court decision and the pending United States Supreme Court decision, action by this Legislature is the most efficient and widely accepted method of addressing the immediate problem of disposing of ceded lands. The United States Supreme Court clearly recognizes the political nature of the ceded lands claims, and the Hawaii State Supreme Court stated as much in their opinion.



In sum, all of the aforementioned pronouncements indicate that the issue of native Hawaiian title to the ceded lands will be addressed through the political process. In this case, Congress, the Hawaii state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever. For present purposes, this court need not speculate as to what a future settlement might entail- *i.e.*, whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement. In other words, . . . the State has a fiduciary duty as trustee to protect the ceded lands pending a resolution of native Hawaiian claims. 117 Hawaii at 213 (2008).

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. 921, H.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 921, H.D. 1, 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,

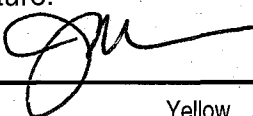


CLAYTON HEE, Chair



The Senate
Twenty-Fifth Legislature
State of Hawaii

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

Bill / Resolution No.:*	Committee Referral:	Date:		
HB 921 HD1	WTL, WAM	3/25/09		
<input checked="" type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: <u>Pass w/ Amendments</u>				
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	6	0	0	1
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

A BILL FOR AN ACT

RELATING TO PUBLIC LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

PART I

SECTION 1. Title 2 of the Hawaiian Homes Commission Act, 1920, is amended by adding a new section to be appropriately designated and to read as follows:

"§ Commercial projects. The department of Hawaiian home lands may negotiate lease terms, including initial lease terms and any extensions, beyond sixty-five years for commercial projects that have or shall be developed pursuant to a land disposition authorized under section 204(a)(2), or a project developer agreement authorized under section 220.5 in consultation with the beneficiaries of the trust. Upon expiration of a lease, the lease may be offered for public auction as provided in this title; provided that the previous lease holder shall be offered the right of first refusal in accordance with the terms of the lease; and provided further that the lease holder shall agree to match at least the highest bid offered at the public auction.



1 As used in this section, "consultation with the
2 beneficiaries of the trust" means a process of engaging those
3 beneficiaries, residing within the geographical area of the
4 property subject to the lease, in a process that provides for
5 the timely dissemination of information and the gathering of
6 input, and allows for a reasonable time and reasonable access to
7 relevant information for evaluation and consideration."

8 **PART II**

9 SECTION 2. Section 171-13, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "§171-13 Disposition of public lands. Except as otherwise
12 provided by law and subject to other provisions of this chapter,
13 the board may:

14 (1) Dispose of public land in fee simple, by lease, lease
15 with option to purchase, license, or permit; provided
16 that no disposition of public lands shall violate
17 section 171-18; and

18 (2) Grant easement by direct negotiation or otherwise for
19 particular purposes in perpetuity on [~~such~~] terms as
20 may be set by the board, subject to reverter to the
21 State upon termination or abandonment of the specific
22 purpose for which it was granted, provided the sale



1 price of [such] the easement shall be determined
2 pursuant to section 171-17(b).

3 No person shall be eligible to purchase or lease public lands,
4 or to be granted a license, permit, or easement covering public
5 lands, who has had during the five years preceding the date of
6 disposition a previous sale, lease, license, permit, or easement
7 covering public lands cancelled for failure to satisfy the terms
8 and conditions thereof."

9 SECTION 3. Section 171-18, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "§171-18 Public land trust. (a) All funds derived from
12 the sale or lease or other disposition of public lands shall be
13 appropriated by the laws of the State; provided that all
14 proceeds and income from the sale, lease, or other disposition
15 of lands ceded to the United States by the Republic of Hawaii
16 under the joint resolution of annexation, approved July 7, 1898
17 (30 Stat. 750), or acquired in exchange for lands so ceded, and
18 returned to the State of Hawaii by virtue of section 5(b) of the
19 Act of March 18, 1959 [~~73 Stat. 6~~], (73 Stat. 5) and all
20 proceeds and income from the sale, lease, or other disposition
21 of lands retained by the United States under sections 5(c) and
22 5(d) of the Act and later conveyed to the State under section



1 5(e) shall be held as a public trust for the support of the
2 public schools and other public educational institutions, for
3 the betterment of the conditions of native Hawaiians as defined
4 in the Hawaiian Homes Commission Act, 1920, as amended, for the
5 development of farm and home ownership on as widespread a basis
6 as possible, for the making of public improvements, and for the
7 provision of lands for public use.

8 (b) Notwithstanding any law to the contrary, all funds,
9 proceeds, and income from the disposition of public trust lands
10 as described in subsection (a), whether by sale, lease, or other
11 disposition, shall be deposited into the public trust as set
12 forth in subsection (a). The funds, proceeds, and income shall
13 be held and used solely for the acquisition of lands, to be set
14 aside for the purposes set forth in subsection (a), with respect
15 to lands ceded to the United States under the joint resolution
16 of annexation or acquired in exchange for lands so ceded and
17 returned to the State, and lands retained under section 5(c) and
18 5(d) of the Act of March 18, 1959 (73 Stat. 5), in order that
19 the public land trust be maintained and not diminished.

20 (c) Except as provided in subsection (d), the State shall
21 not dispose of any public trust lands in fee simple, including
22 any disposition by lease with option to purchase; provided that



1 the State may dispose of public trust lands upon one of the
2 following occurrences:

3 (1) The claims of the native Hawaiian people, as defined
4 in the United States Apology Resolution, Pub. L. No.
5 103-150 (1993), have been resolved; or

6 (2) The legislature finds pursuant to a concurrent
7 resolution adopted by at least two-thirds majority
8 vote of the members to which each house is entitled
9 that the State no longer supports reconciliation
10 between the State and the native Hawaiian people.

11 (d) The limitations on the sale and transfer of lands
12 pursuant to subsection (c) shall not prevent the State from:

13 (1) Disposing of remnants, as defined in section 171-52;

14 (2) Providing easements to public utilities and government
15 agencies pursuant to section 171-95;

16 (3) Engaging in land exchanges pursuant to sections 171-50
17 and 171-51;

18 (4) Disposing of public trust lands that are part of
19 negotiations between the office of Hawaiian affairs
20 and the State with respect to issues relating to the
21 income and proceeds from the lands in the public
22 trust;



1 (5) Disposing of public trust lands after December 31,
2 2014; provided that the disposition is approved by the
3 legislature by concurrent resolution adopted by at
4 least two-third majority vote of the members to which
5 each house is entitled; and

6 (6) Disposing of public trust lands, provided that all of
7 the following conditions are met:

8 (A) The State establishes a compelling state interest
9 for the disposition;

10 (B) There is no reasonable alternate means to
11 accomplish the compelling state interest;

12 (C) The disposition is limited to accomplishing the
13 compelling state interest; and

14 (D) The disposition is approved by the legislature by
15 concurrent resolution adopted by at least two-
16 thirds majority vote of the members to which each
17 house is entitled."

18 **PART III**

19 SECTION 4. The provisions of the amendments made by this
20 Act to the Hawaiian Homes Commission Act, 1920, as amended, are
21 declared to be severable, and if any section, sentence, clause,
22 or phrase, or the application thereof to any person or



1 circumstances is held ineffective because there is a requirement
2 of having the consent of the United States to take effect, then
3 that portion only shall take effect upon the granting of consent
4 by the United States and effectiveness of the remainder of these
5 amendments or the application thereof shall not be affected.

6 SECTION 5. This Act does not affect rights and duties that
7 matured, penalties that were incurred, and proceedings that were
8 begun before its effective date.

9 SECTION 6. If any provision of this Act, or the
10 application thereof to any person or circumstance is held
11 invalid, the invalidity does not affect other provisions or
12 applications of the Act, which can be given effect without the
13 invalid provision or application, and to this end the provisions
14 of this Act are severable.

15 SECTION 7. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 8. This Act shall take effect on July 1, 2009.



Report Title:

DHHL; Commercial Projects; Ceded Lands; Public Land Trust; Management

Description:

Permits the DHHL to negotiate lease terms beyond sixty-five years, and provides a right of first refusal to previous lessees. Prohibits the sale or transfer of ceded lands until the unrelinquished claims of the native Hawaiian people are resolved or reconciliation between the State and the native Hawaiian people is no longer supported, whichever occurs first; except in the following circumstances: disposing of remnants, providing easements to public utilities and government agencies as provided by law, land exchanges as provided by law, dispositions that are a part of the ceded lands negotiations between OHA and the State, dispositions after December 31, 2014, that are approved by a 2/3 vote of both houses of the legislature, or when a compelling state interest for the disposition is established. (SD1)

