

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, January 29, 2011 2:42 PM
To: HAWtestimony
Cc: sterlingw@oha.org
Subject: Testimony for HB399 on 1/31/2011 10:00:00 AM
Attachments: HB 399 OHA Past Due Revenue.pdf

Testimony for HAW/WLO 1/31/2011 10:00:00 AM HB399

Conference room: 325
Testifier position: support
Testifier will be present: Yes
Submitted by: Sterling Wong
Organization: Office of Hawaiian Affairs
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E-mail: sterlingw@oha.org
Submitted on: 1/29/2011

Comments:

Please note that OHA CEO Clyde Namuo will testify on behalf of the agency. Mahalo



HB 399
RELATING TO THE PORTION OF INCOME AND PROCEEDS FROM THE LANDS
OF THE PUBLIC LAND TRUST FOR USE BY THE OFFICE OF HAWAIIAN
AFFAIRS

House Committee on Water, Land and Ocean Resources
House Committee on Hawaiian Affairs

January 31, 2011

10:00 a.m.

Room 325

The Office of Hawaiian Affairs strongly **SUPPORTS** HB 399. This bill seeks to have the State do what is right and long overdue and resolve its debt to OHA resulting from public land trust revenues unpaid from 1978 to 2010.

If enacted, HB 399 will establish the debt at \$200 million minimally and provide for annual payments of at least \$30 million beginning July 1, 2015 until the debt is paid. HB 399 would also require the State to pay interest to OHA beginning July 1, 2010. In lieu of cash payments, the state executive branch, beginning July 1, 2011 and with OHA's approval, could substitute, for all or any part of the cash payments, land having the fair market value of the cash for which the land is being substituted.

The delay in payment of the debt as permitted by this bill is OHA's recognition of the State's presently difficult financial circumstances. However, the OHA Board of Trustees believes that the State's economy will be on its way to recovery within three to five 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 399 provides the opportunity for the Legislature to take a major step in resolving an issue that has remained unresolved 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.

The following information may be useful as background information during the committee's consideration:

- 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 thank you for considering this bill. The issue is complex, but when 30 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 look forward to working tirelessly with the Legislature, as we have done over the years, to find a fair and just solution.

We urge your Committees to PASS HB 399.

Mahalo for the opportunity to testify on this important measure.

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, January 29, 2011 3:55 PM
To: HAWtestimony
Cc: acamaral@yahoo.com
Subject: Testimony for HB399 on 1/31/2011 10:00:00 AM
Attachments: HB 399 Settlement bill 2011 testimony.doc

Testimony for HAW/WLO 1/31/2011 10:00:00 AM HB399

Conference room: 325
Testifier position: support
Testifier will be present: Yes
Submitted by: Soulee Stroud
Organization: Assn. of Hawn. Civic Clubs
Address: 5019 Poola St. Hon. Hi 96821
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E-mail: acamaral@yahoo.com
Submitted on: 1/29/2011

Comments:

ASSOCIATION OF HAWAIIAN CIVIC CLUBS

TESTIMONY BY
PRESIDENT SOULEE STROUD

IN SUPPORT OF HOUSE BILL 399
Relating to the Portion of Income and
Proceeds from the Lands of the Public Land Trust for Use
By the Office of Hawaiian Affairs

Before the Joint Committees on
Water, Land & Ocean Resources and Hawaiian Affairs
February 2, 2011; 10:00 a; Room 325

Aloha Mr. Chairman Chang, Madame Chair Hanohano and members of the joint committees. I am Soulee Stroud, President of the Association of Hawaiian Civic Clubs here today to support the passage of House Bill 399.

The first civic club was founded in 1918 and we continue to thrive with clubs on all islands of the State of Hawaii, 11 states on the continent and the District of Columbia. We now have more than fifty component clubs participating in those activities that our founders envisioned – historic preservation, education of Native Hawaiian students, protection of traditional culture and advocacy for Hawaiian Home Lands. We have also been very supportive of the Office of Hawaiian Affairs(OHA) since its inception, and partnered with OHA on many occasions.

On January 18 members of the Board and I met with OHA administrative staff, and received a briefing and summaries of the OHA package.

A few days later, on January 22, 2011 the Board of Directors met in a quarterly meeting that included Board members from all islands and several from the continent. Our agenda included a discussion of the OHA legislative package and the Board was unanimous in its vote to support the entire package.

As a result, we provide you with our supportive testimony on HB 399. The purpose of this bill is to assure the transfer of cash or land to OHA pursuant to Article 12, Sections 4 and 6 of the State Constitution, for the period of Nov. 1978 to July, 2010.

The Legislature has been clearly directed by the Hawaii Supreme Court in *OHA v, State of Hawaii*, 96 Haw. 388, 31 P. 3d 901 (2001) "...to specify the apportionment to be managed and administered by the office of hawaiian affairs."

Further, the Supreme Court has articulated 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."

We see HB 399 as a step to assist the Legislature in the policy decision-making responsibilities and we affirm, that this is a requirement that cannot be delayed any further. We ask you to move forward in settling past debts and allow the Office of Hawaiian Affairs the ability to support its mission and na kanaka oiwi access to its full and proper benefits.

Thank you for your consideration. We urge your support of these measure.

For further information please contact our Government Relations Chair, Jalna Keala at jalna.keala2@hawaiiantel.net.

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Monday, January 31, 2011 8:07 AM
To: HAWtestimony
Cc: hwburgess@hawaii.rr.com
Subject: Testimony for HB399 on 1/31/2011 10:00:00 AM
Attachments: 110130 HWB tstmny PLT settlement.doc

Testimony for HAW/WLO 1/31/2011 10:00:00 AM HB399

Conference room: 325
Testifier position: oppose
Testifier will be present: Yes
Submitted by: H. William Burgess
Organization: Aloha4all, Inc.
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Phone: 808-947-3234
E-mail: hwburgess@hawaii.rr.com
Submitted on: 1/31/2011

Comments:

Legislature State of Hawaii
House Committees on Water, Land & Ocean Resource
and Hawaiian Affairs

Hearing: Monday, January 31, 2011 10:00 a.m. Conference Room 325

On HB 399 which would require the transfer of cash or land to OHA as income or proceeds that OHA is allegedly entitled to receive from the public land trust pursuant to article XII, sec. 4 and 6 state constitution, for the period from 11/7/1978 to 7/1/2010.

Testimony by H. William Burgess, attorney at law and chairman of Aloha for All, Inc ¹

Aloha and good morning Chairs Jerry Chang, Fay P. Hanohano and members of these two House committees.

I am an attorney who practiced law in Hawaii for 35 years until I retired in 1994. For the last eleven years my wife and I and our friends and supporters and many of my clients have been advocating and litigating for the basic principle that Aloha is for everyone --- that every citizen of Hawaii, whatever his or her ancestry, is entitled to the equal protection of the laws and equal privileges and immunities under the laws. A major part of our efforts has been to preserve and support the Ceded Lands Trust for the benefit of **all** the people of Hawaii, not just for a favored few.

I speak against HB 399. It deals with the 1.2 million acres of the ceded lands separate from the approximately 200,000 acres set aside under the Hawaiian Homes Commission Act. HB 995 would require the State and the Governor and other responsible state officials to violate this portion of the Ceded Lands Trust and breach the fiduciary duty the State of Hawaii, as Trustee of the federally-created Ceded Lands Trust, owes to all its citizens.

The Ceded lands Trust is a federal trust for all the people of Hawaii, not just Native Hawaiians.

Decades of advertising by OHA seem to have created the impression in many peoples' minds that the ceded lands are held only or especially for native Hawaiians. That is incorrect. The ceded lands trust is for the benefit of all the people of Hawaii. The U.S. Supreme Court has confirmed that. So has the Ninth Circuit. So has the Hawaii Supreme Court.

Breach of trust (whether the trustee is an individual or a corporation or a federal, state or local government acting by its responsible officials) is a serious offense

¹ Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and property owners in Hawaii who believe that Aloha is for everyone and every citizen is entitled to the equal protection of the laws without regard to her or his ancestry.

punishable under the penal code.

In footnote 9 to the Ninth Circuit Court's decision filed August 7, 2007, the Court noted that "the lands ceded in the Admission Act are to benefit 'all the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034 (9th Cir. 2007) (emphasis in original), citing Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." (The 1.2 million acres consists of the 1.4 million acres returned to Hawaii upon statehood under Admission Act §5(b), less the about 200,000 acres Congress had set aside in 1921 as "available lands" under the Hawaiian Homes Commission Act. See also, Admission Act §5(g). It is this same about 1.2 million acres which is the corpus of the Ceded Lands Trust which is the source of the moneys claimed by OHA and proposed to be paid to OHA by HB 399).

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

"Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *Id* at 125.

The State of Hawaii acknowledged in its brief to the United States Supreme Court in *State v. OHA*, No. 07-1372, that the State's Trust obligations as to the ceded lands "run to all the people of Hawaii, and not just Native Hawaiians." State Brf. at 9; and urged the high court to hold that the Apology Resolution does not repeal the Newlands Resolution or the Admission Act; that those federal laws foreclose OHA's claim that Native Hawaiians have title to the ceded lands; and those federal enactments also "**foreclose any judicial remedy that rests on the potential validity of such claims.**"

The State's June 4, 2008 revelation. The Ceded Lands Trust generates no net income from which distributions to beneficiaries could lawfully be made.

On June 4, 2008 in *Day v. Apoliona*, the State of Hawaii, apparently for the first time in history, publicly accounted, at least in part, for and acknowledged that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged that this disparity between trust expenses and receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the District Court or to the Ninth Circuit.

The Ceded Lands Trust distributions to OHA as "income and proceeds from that pro rata portion of the trust ... for native Hawaiians" have all been based on a false premise that only the pro rata of the net income for Native Hawaiians is going to OHA.

Trust law as to distributions to income beneficiaries.

In *Day* at 496 F.3d 1033 the Court reaffirmed that basic trust law principles apply to the Ceded Lands Trust.

(1) Uniform Principal and Income Act, "UPIA" HRS 557A-102, "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period.

The Restatement of the Law, Second, Trusts, 1959, puts it this way:

§ 233 Allocation of Receipts and Expenses to Principal or Income.

(1) Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,

(a) the former beneficiary is entitled to, and only to, the net income during such period, and

(b) the latter beneficiary is entitled to the principal on the expiration of such period.

(2) The net income is ascertained by subtracting expenditures allocable to income from receipts allocable to income.

State: Beneficiaries only entitled to net income.

The State of Hawaii in its May 2, 1997 Appellant's Amended Opening Brief in *State*, Civ. No. 94-0205-1 before the Hawaii Supreme Court made the same point beginning at (SER F in No. 08-16668 page 254):

"Revenue" Includes Only Net Income. Not Gross Receipts.

Even if OHA's 20% share were to be calculated on a basis that included income from improvements as well as from the land, the partial summary judgments for OHA would still be inappropriate. Under Act 304, "Revenue" means all proceeds, fees, charges, rents, or other income or any portion thereof, derived from [various specified sources]." Thus, "revenue" refers to types of "income." A treatment consistent with the delineation of the trust in Section 5(f) of the Admission Act as consisting of the "lands and the income there from." And the word "income," although not specifically defined in the statute, has a settled meaning in the law generally and in the law of trusts in particular.

"Income" – and therefore "revenue" – does not mean gross receipts, as the Circuit Court apparently assumed. To the contrary, it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. *In re Bernice P. Bishop Estate*, 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net

annual income”): *id* at 464 (“[t]he word ‘income’ as employed in the will unquestionably means net income”) (Peters, J., concurring in part and dissenting in part: emphasis added).

2A SCOTT & FRATCHER, THE LAW OF TRUSTS § 182, at 550 (4th ed. 1987) (trustee’s duty to pay income to beneficiary is limited to paying “the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust”).

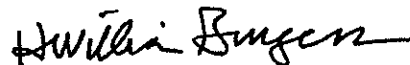
What this means, then is that OHA is not entitled to 20% of the gross receipts of the Hilo Hospital or the public housing, but only to 20% of the net income (if any) from those facilities (unless they are sovereign functions, see subpoint C, *infra*). Any other interpretation leads to absurd results. Absent compelling evidence of a contrary legislative intent – and there is none – it is untenable to conclude that the Legislature meant in adopting Act 304 to depart from settled principles of trust law and to mandate such a fiscally imprudent state of affairs.

The magnitude of distributions.

The distributions to OHA began with fiscal year ended June 30, 1981 and continued to the present. The 2007 Financial Report of OHA, show Public Land Trust balance of \$452,703,266 exclusively for the betterment of native Hawaiian and Hawaiian beneficiaries. During that almost three decades the State has made NO distributions exclusively for the rest of the beneficiaries.

OHA owes the State. HB 399 calls for the State to give OHA another \$200M of land or money. The State has already given OHA over \$400M at the expense of the other beneficiaries. Instead of further misapplication of trust funds, the State should recover from OHA all the moneys and lands already illegally paid to OHA.

Please reject HB 399. Mahalo. Honolulu, Hawaii January 30, 2011.



H. William Burgess

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LATE TESTIMONY

~~Journal~~

From: mailinglist@capitol.hawaii.gov
Sent: Friday, January 28, 2011 5:23 PM
To: HAWtestimony
Cc: garrypsmith@juno.com
Subject: Testimony for HB399 on 1/31/2011 10:00:00 AM

Testimony for HAW/WLO 1/31/2011 10:00:00 AM HB399

Conference room: 325
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Garry P. Smith
Organization:
Address: 91-321 pupu place ewa beach, hi 96706
Phone: 808.392.5559
E-mail: garrypsmith@juno.com
Submitted on: 1/28/2011

Comments:

I strongly oppose the payment of \$200 Million for supposed incorrect payments to OHA over this time period. The payments are supposed to be 20% of ceded land income after consideration for expenses by the state. This formula has not been used. OHA wants 20% of the gross and not 20% of the net income which there was little. Ceded lands do not provide any income to the state after expenses for infrastructure, etc. Additionally, for OHA to receive 20% then the other 4 areas of the 5(f) trust under the admissions act should also receive 20% each which they do not. The state does not owe this money, cannot afford to pay and have all ready paid more than this amount to native Hawaiian residents through various programs. OHA is not owed anything and should not be paid.