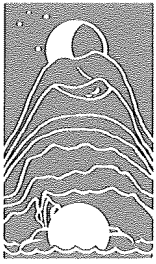


**SB 981**  
**LATE TESTIMONY**



# NATIVE HAWAIIAN LEGAL CORPORATION

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## **SENATE BILL 981 RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS**

### **BEFORE THE SENATE COMMITTEE ON HAWAIIAN AFFAIRS**

DATE: Wednesday, February 9, 2011  
TIME: 2:45 p.m.  
PLACE: Conference Room 224

Chairperson Galuteria, Vice-Chairperson Ryan and members of the Senate Committee on Hawaiian Affairs. Aloha. Thank you for this opportunity to provide testimony in support of Senate Bill 981, relating to the Office of Hawaiian Affairs.

My name is Moses Haia and I am the Executive Director of the Native Hawaiian Legal Corporation (NHLC). NHLC is a non-profit, public interest law firm which endeavors to provide low cost legal assistance to Native Hawaiian individuals, families and communities in their individual and collective efforts to preserve their traditional Hawaiian way of life. SB 981 seeks to provide training and education to the members of appropriate councils, boards, and commissions about native Hawaiian and Hawaiian traditional and customary rights, natural resource protection and access rights, and the public trust.

The cases undertaken by NHLC include assertion of ahupua`a tenants' and kuleana rights; access and water rights; protection and preservation of traditional and customary practices; and, the protection of historic sites, including burials. In many cases, a council, board, or commission of the state or a political subdivision of the state presides over these issues. It is, therefore, critical that the members of these entities have a working understanding of the laws relevant to these matters. It is perhaps even more critical that these members understand the important underpinning of these laws; the history of Hawaii. This history, after all, provides the very basis for the decision making authority of each council, board, and commission as well as the particular legal context within which they must make decisions on behalf of the public at large.

The history of customs, traditions, and the laws that apply today are unique to Hawai'i and do not fit entirely within a western framework. The Hawaiian scholar David Malo notes, "the king was over all the people; he was the supreme executive, so long, however, as he did right." *See*, David Malo, *Hawaiian Antiquities*, 53 (Bishop Museum Press, 1951 ed.). Malo also confirms that the ruling chiefs were bound by trust to see to the welfare of the people and the land. Along with the power and authority to distribute the assets of the kingdom, the chiefs had the duties of trustees, obligated to ensure the

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beneficial use of the land for all of the people. The ancient Hawaiian regulations regarding water and land grew out of this concept of mutual benefit and sharing. *Id.* at 195.

In the following passage from Reppun v. Board of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982) (“*Reppun*”), the Hawai`i Supreme Court captures the essence of the problem when pre-western contact Hawaiian history is interpreted and explained through a western lense:

The western doctrine of “property” has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others and the right to transfer the property with consent of the “owner”. In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-[Mahele] judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, **the creation of private and exclusive interests in water, within the context of western concepts of property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.**

*Id.* at 547, 656 P.2d at 68. (Emphasis added).

Thirteen years later, the Hawai`i Supreme Court noted, “[a]lthough the court in *Reppun* focused on interests in water, its discussion of the development of Hawaiian property rights was enlightening” when dealing with the exercise of traditional and customary native Hawaiian practices. Public Access Shoreline Hawaii v. Hawai`i County Planning Commission, 79 Hawai`i 425, 443, 903 P.2d 1246, 1264 (1995) (“*Kohanaiki*”).

As the Court further acknowledged in *Reppun*, 65 Hawai`i at 542, 656 P.2d at 65, and subsequently reaffirmed in *Kohanaiki*, 79 Hawai`i 425, 443, 903 P.2d 1246, 1264 (1995):

In 1840 the first constitution of the Kingdom of [Hawai`i] proclaimed that although **all property** belonged to the crown ‘it was **not his private property**. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property.’ [Hawai`i Const. Of 1840 in *Fundamental Laws of Hawaii* 3 (1904)]. Thus, prior to the [Mahele], all land remained in the **public domain**. However, other laws passed during the same period lay the foundation for the eventual imposition of private property rights in land by limiting the King’s and landlords heretofore unregulated authority to disseize one to whom land had been granted and **insuring certain rights of the common people and lesser lords**. (Emphasis added).

Furthermore, after a thorough review and careful analysis of the development of the western concept of private property in Hawai`i, the *Kohanaiki* Court noted with great import that:

Provisions of the law requiring the landlord’s consent [before the common people could go to the mountains and the seas] were repealed...because

‘many difficulties and complaints have arisen from the bad feeling existing on account of the Konohiki’s [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them.’

*Id.* at 446, 903 P.2d, at 1267.

These and other historical realities led the *Kohanaiki* Court to logically conclude that “the western concept of exclusivity is not universally applicable in Hawai‘i...In other words, the issuance of a Hawaiian land patent confirmed a *limited* property interest as compared with typical land patents governed by western concepts of property.” *Id.* at 447, 903 P.2d, at 1268 (emphasis added).

The State and its political subdivisions, which now stand in the shoes of the King, must, in conformance with their fiduciary duties as trustees of the public trust, act in the best interests of the people. Hawaii Revised Statutes (“HRS”) § 1-1, confirms that the common law of Hawai‘i is ultimately subject to Hawaiian usage unless modified by case law, statute or the constitution.<sup>1</sup> To a large extent, the current form of Article XII, § 7 of Hawaii’s Constitution is a reflection of the state’s responsibility when it comes to custom and usage.

Article XII, § 7 of the Constitution of Hawaii confirms that all state councils, commissions, and boards must consider those rights traditionally and customarily exercised for subsistence, cultural, and religious purposes in the exercise of their regulatory authority. *Kohanaiki*, 79 Haw. at 451. Essentially, these rights, imbued with constitutional protection, are a part of the public trust. As such, these public agencies, are “obligated to protect the reasonable exercise of [these rights] to the extent feasible.” *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43. While these rights are subject to reasonable regulation, agencies may not regulate them “out of existence.” *Id.* at 451, 903 P.2d at 1272.

Accordingly, the *Kohanaiki* Court explained that “HRS § 1-1 represents the codification of the doctrine of custom *as it applies in our State*.”<sup>2</sup> The *Kohanaiki* Court examined HRS § 1-1 and its predecessors and essentially concluded that Hawaiian usage or custom has always had primacy over English and American common law.<sup>3</sup> In other words, unlike other legal systems that are also based (at least in part) upon Anglo-Saxon traditions, that common law does not have chronological priority in Hawai‘i.<sup>4</sup>

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<sup>1</sup> See, *Kohanaiki*, 79 Haw. at 437 n.21, 903 P.2d at 1258 n.21 (tracing this provision to the Laws of 1892, ch. LVII, § 5, but acknowledging that the native usages and customs in regard to landed tenures were preserved throughout the historical development of the kingdom’s written laws); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (quoting the Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7, which constrained the Land Commission’s power to quiet title “in accordance with . . . native usages in regard to landed tenures”).

<sup>2</sup> 79 Hawai‘i at 447, 903 P.2d at 1268 (emphasis in original).

<sup>3</sup> See David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Hawai‘i Bar Journal 23-26 (1998).

<sup>4</sup> 79 Hawai‘i at 441 n.26, 903 P.2d at 1262 n.26 (citing Blackstone).

Given the above, each and every member of a council, board or commission has, at a minimum, a moral obligation to endeavor to truly understand the significance Hawaiian history plays in the formation, enactment and enforcement of our laws. Each one of them also has a legal duty as a public trustee to have a working knowledge of the laws and rights that arise out of that history. Truly understanding the importance and primacy of the above will provide these entities with the ability and capacity to arrive at balanced, informed decisions. It is then incumbent upon them to do so and not let politics undermine the process. Mahalo for the opportunity to provide our input on this very important subject.

# LATE

ASSOCIATION OF HAWAIIAN CIVIC CLUBS  
TESTIMONY OF PRESIDENT SOULEE STROUD

**IN SUPPORT OF SENATE BILL 981**

RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS  
Before the  
COMMITTEE ON HAWAIIAN AFFAIRS

Wednesday; February 9, 2011; 2:45 p.; Room 224

Aloha Chairman Galuteria and vice chair Ryan and members of the committee on Hawaiian Affairs. I am Soulee Stroud, president of the Association of Hawaiian Civic Clubs here to support Senate Bill 981, Relating to the Office of Hawaiian Affairs.

This is one of several bills introduced by the Office of Hawaiian Affairs, and on January 22, 2011 the Association Board of Directors met and reviewed the summaries of the OHA bills. The Board represents all the councils and all sixty component clubs of our organization, and voted unanimously to support the OHA legislative package.

This particular OHA bill would amend Chapter 10 of the Hawaii Revised Statutes to add a section that **requires training on Native Hawaiian and Traditional and Customary Rights, Native Hawaiian and Hawaiian Natural Resource Protection and Access Rights, and the State's Obligations under the Public Trust.**

Training of this kind is long over-due, given the dynamics of a changing population in Hawaii. While we support this measure, we will also offer our support to the Office of Hawaiian Affairs to assist wherever we can be useful in this effort.

Thank you for the opportunity to testify and we urge the passage of this bill.

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